APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND
PHILLIPS PETROLEUM COMPANY, *Petitioners,*

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA;
COINOCO; UNITED STATES OF AMERICA, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1978
CERTIORARI GRANTED JUNE 19, 1978

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RELEVANT DOCKET SHEET ENTRIES UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

DOUGLAS OIL COMPANY OF CALIFORNIA
and PHILLIPS PETROLEUM COMPANY,
Real Parties in Interest-Appellants,

vs.

UNITED STATES OF AMERICA
Respondent-Appellee

Case No. Misc. No. 5706 (WPG)

Date	Filings — Proceedings
4/15/76	Fld Petnr's Petn for production for inspection of Transcripts of G/J Testimony & documents produced purs to subp D/T.
	Fld petnrs' memo of P/A and affids in support. Received Applic for an ord of non-resident atty to appear in a specific case.
1/10/77	Fld Supplement to Petn; Fld Govt's response to petn.
1/31/77	Fld response of Douglas Oil Co. of Calif to Petn for product of G/J Docs.
2/ 1/77	Fld Memo of Real Pty in Interest Phillips Petroleum Co in oppos to mot for product of G/J Docs.
2/ 2/77	Ent min ord (MML) Trans hrg on pet for product of docs to cal of WPG for all fur prodgs. Mld copies to all ensl.
2/ 4/77	Fld petn'r not of hrg on said petn for production of G/J Docs for 2/10/77 at 2PM before Judge Gray.

Date	Filings — Proceedings
*3/ 4/77	Fld Deft Phillips Petroleum's Notice of Opposition to Petn to Impound GJ Notes, etc.
3/28/77	MIN ORD: Hrg mtn petnr for prdcn etc GJ Transcripts & ord grntg in part & overruling in part. ensl petnrs dir subm formal ord thereon.
5/ 5/77	Fld ORD (WPG) that petn for cy and inspec of G/J min is granted.
5/ 6/77	Fld note of hrg re form of order for procs 5/27/77, 10AM.
5/19/77	Fld Not of appeal by real pty in interest Douglas Oil Co of Calif. rak.
5/24/77	Fld real pty in interest not of mot & Mot rtnble 5/31/77-10am, for stay of enforcement of judgment pending appeal and for approval of supersedeas bond & Order w/memo of pts & auths in support.
5/31/77	Fld petnr's memo in oppost to mot for sty of enforcement of judgment.
5/31/77	Minute Order, Hearing Motion Defts Phillips & Douglas Oil to stay pending appeal & for supersedeas bond & order granting 30 day stay & order denying bond.
6/10/77	Fld. Appellants, Designation of Record on Appeal.
6/21/77	Fld. Bond on Appeal.

RELEVANT DOCKET SHEET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETROL STOPS NORTHWEST *et al.*

v.

UNITED STATES OF AMERICA

DOUGLAS OIL COMPANY OF CALIFORNIA *et al.*

Real Parties in Interest

Date	Filings — Proceedings
6/15/77	FILED APLTS' MOTION FOR STAY PENDING APPEAL; MEMORANDUM IN SUPPORT. (to Schickele w/exhibits) 6/14/77
6/15/77	DOCKETED CAUSE & ENTERED APPEARANCES OF COUNSEL.
6/29/77	Rec'd Reply Memorandum of Appellees (Petrol Stops Northwest, Gas-A-Tron of Arizona, and Coinoco) in opposition to appellants' motion for stay pending appeal. 6/28 (late)
6/30/77	Filed Order (Br & Cy, CJJ) upon due consideration of appellants' motion and appellees' opposition, the district court's order of May 17, 1977 is hereby stayed pending appeal and the Clerk shall expeditiously calendare *(sic)* the appeal upon completion of briefing.
9/19/77	Filed, as of Sep 15, 25 Aplts' Briefs (9/12/77).
10/17(77	United States doe *(sic)* not intend to file a brief or otherwise participate in this appeal per their letter of Oct 11, 1977 rec'd 10-17-77.
11/ 4/77	Filed 25 Aplees' Briefs (Petro Stops Northwest, et al) 10/31/77.
11/ 4/77	Filed motion of aples to supplement record on appeal. 10-31.

Date	Filings — Proceedings
11/ 7/77	Filed response of aplts in opposition to motion to aples to supplement record.
11/14/77	Filed reply or aples to response of aplts in opposition to motion to supplement record on appeal.
12/ 6/77	Rec'd, as of Dec 5, 25 Aplts' Reply Briefs (12/2/77) late, motion for ext pending.
12/13/77	Filed, as of Dec. 5, order (H) Upon due consideration, the motion to supplement the record is denied and the material in issue may be lodged with the court for such use as the panel which determines this appeal on its merits deems proper. Aplts are granted an ext of time through Dec. 5, 1977 in which to file their reply brief.
12/14/77	Filed, as of Dec. 5, 25 Aplts' Reply Briefs (12/2/77).
12/22/77	LODGED, SUPP'L RECORD, REC'D 11/14/77, PURSUANT TO ORDER OF 12/5/77.
2/14/78	As of Feb. 7, ARGUED & SUBMITTED BEFORE: CARTER, GOODWIN, CJJ, & SOLOMON, DJ.
3/24/78	As of Mar. 20, ORDERED OPINION (GOODWIN) FILED & JUDG TO BE FILED & ENTD.
3/24/78	As of Mar. 20, Filed opinion — AFFIRMED.
3/24/78	As of Mar. 20, Filed & Entd Judgment.
4/10/78	Filed aplts' motion for stay of mandate. 4/10 (G)
4/18/78	Filed, as of Apr. 14, order (G) Staying the issuance of mandate to April 28, 1978.

Date	Filings — Proceedings
4/18/78	Rec'd as of 4/17, appellees' Memorandum in opposition to motion for stay of mandate. 4/14 (see order of 4/14) (G)
5/ 8/78	Received as of May 5, 1978 Supreme Court notice of filing petition for certiorari on April 28, 1978, assigned No. 77-1547.
5/23/78	Filed certified SC order of 6/19/78 GRANTING petition for certiorari (copies sent to panel).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETROL STOPS NORTHWEST,
GAS-A-TRON OF ARIZONA, AND
COINOCO,
Appellees,

v.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF
CALIFORNIA,
PHILLIPS PETROLEUM COMPANY,
Appellants.

No. 77-2305

OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: CARTER and GOODWIN, Circuit Judges, and SOLOMON*, District Judge.

GOODWIN, Circuit Judge:

Two oil companies that had entered *nolo contendere* pleas in criminal-antitrust cases appeal an order in related civil litigation which permits the civil plaintiffs substantial discovery of evidence collected by the government in the criminal case.

Petrol Stops and associated plaintiff companies are suing Douglas Oil, Phillips Petroleum, and other defendant oil companies in the District of Arizona for damages for alleged antitrust violations. After the damage action was filed, the United States brought the criminal antitrust charges against the same defendants in the Central

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

District of California. The indictment charged antitrust conduct similar to that alleged in the damage action. After the court in the criminal case accepted the *nolo contendere* pleas from all the defendants, the criminal cases were concluded. Thereupon Petrol Stops filed a petition in the district court in Los Angeles, seeking disclosure of testimony and materials which Douglas, Phillips, and their employees had provided the grand jury during its investigations in that district.

The United States, the only respondent to Petrol Stops' petition, stated that it had no objection to the disclosure. Douglas and Phillips, styling themselves real parties in interest, appeared and opposed the petition. The district court granted Petrol Stops' request, subject to a protective order which limited disclosure to Petrol Stops' attorneys, prohibited further copying, limited the use of the evidence to impeachment, refreshing recollection, and testing credibility, and required return of the materials when they were no longer needed. Douglas and Phillips raise a number of issues in challenging the order.

I

The first issue is standing to appeal. Douglas and Phillips were not named as parties below, and the United States, the only named party respondent, declines to participate in this appeal. The district court's order does not require Douglas or Phillips to do anything, and they did not seek to intervene in that court.

The Third Circuit has held on such facts that parties situated somewhat similarly have no standing to oppose production of grand jury documents. *United States v. American Oil Company*, 456 F.2d 1043 (3d Cir. 1972).

We hold, however, that Douglas and Phillips have standing. The proceeding directly affects their interests.

After the United States declined to oppose the petition, Douglas and Phillips were the only parties who could provide the adversity necessary for the full presentation of all issues.

While grand jury secrecy primarily protects the public interest in assuring full disclosure to the grand jury, it also protects some important private interests. One is the avoidance of public disclosure of normally confidential information. Another is the protection of those who provide information.

Douglas and Phillips might be injured in fact by disclosure. They are arguably within the zone of interests which grand jury secrecy protects. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152-53 (1970).[1] While the United States is the primary proponent of the public interests involved, Petrol Stops suggests no reason for denying to Douglas and Phillips the right to assert a public-interest point in a matter in which the public interest may also protect them.

Petrol Stops candidly seeks discovery of evidence to use against Douglas and Phillips in a civil case. If Petrol Stops sought the identical evidence by a civil discovery motion, Douglas and Phillips, without question, would have standing to resist the motion.

The district court in Arizona might hesitate to grant discovery in the civil case, either because it has no direct connection with the grand jury, or because of deference to the district court which convened the grand jury. By petitioning the court in the district in which the grand jury sat, Petrol Stops avoided any jurisdictional dispute.

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[1] There are obvious differences between *Data Processing* and this case; among them are that Douglas and Phillips are seeking standing as respondents, not as petitioners, and that this proceeding is not an administrative review. However, *Data Processing* is, at least in part, constitutionally based, and we find its analysis helpful here.

It does not follow, however, that Douglas and Phillips should have no opportunity to participate. It may have been better for Douglas and Phillips to intervene as respondents in the district court, but the question is before us and we are satisfied that standing exists.[2]

II

Because grand jury secrecy serves a number of public purposes, a civil litigant may not violate it at his pleasure. It is not sufficient that the litigant might find it useful to do so. The Supreme Court requires a showing of particularized need before allowing disclosure. In *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the court refused to allow wholesale production of a grand jury transcript to a civil antitrust defendant able to show only that the transcript would be useful in preparing the defense. In *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), the court rejected a claim that civil defendants had a right to the transcript because it dealt with subjects which the same witness later covered at the trial. Nothing had appeared in the case at the time to indicate possible inconsistencies in the testimony.

The cases teach that disclosure would be proper when the ends of justice required. Defendants in such cases undoubtedly keep copies of all documents they furnish the grand jury, and they have frequent and informal contact with their employees who testify. The court reasonably could conclude that a plaintiff's need for grand jury records to ferret out the facts in a private antitrust action might be far more compelling than a defendant's curiosity about what its employees may have disclosed.

[2] Our conclusion and some of our reasoning follows that of the Seventh Circuit in the very similar case of *Illinois v. Sarbaugh*, 552 F.2d 768 (7th Cir.), *cert. denied sub nom. J.L. Simmons v. Illinois*, 46 U.S.L.W. 3238 (1977).

We previously applied the Supreme Court's standards in *U.S. Industries, Inc., v. United States District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965). The trial court had ordered that the plaintiffs in a private antitrust suit be given access to a government presentencing memorandum, based in part on grand jury material, in a prior antitrust prosecution. U.S. Industries, the defendant in both actions, had examined the memorandum. We affirmed the trial court's action after deleting some statements from the disclosure. In doing so we held that, because the criminal case was over, only one of the five classic reasons for grand jury secrecy,[3] that of insuring untrammeled disclosure by future witnesses, applied. This reason, which was not strong, had to be balanced against the plaintiff's need for the information, which need not be great. "[I]f the reasons for maintaining secrecy do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need." 345 F.2d at 21.

District courts generally adopt a similar analysis in this situation. The consideration they find to be relevant is that of protecting witnesses from retaliation. Corporate witnesses are vulnerable to their corporate em-

[3] The reasons were first stated in *United States v. Amazon Ind. Chem. Corp.*, 55 F.2d 254 (D. Md. 1931); the Supreme Court adopted them in *United States v. Procter & Gamble*, 356 U.S. at 681-82, n.6. They are: "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at a trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

ployers, but the need for protection is limited after the corporation already has its employees' testimony. Limiting the use of the materials can give adequate assurances of safety to future witnesses. Thus, most courts grant access with only a minimal showing of particularized need; they commonly see use of the material for impeachment as sufficient. *SEC. v. National Student Marketing,* 430 F. Supp. 639 (D.D.C. 1977); *In Re Cement-Concrete Block, Chicago Area, Grand Jury Proceedings,* 381 F. Supp. 1108 (N.D. Ill. 1974); *Illinois v. Harpor & Row Publishers, Inc.,* 50 F.R.D. 37 (N.D. Ill. E.D. 1969). Courts do not, however, generally see a request for general discovery, or a mere showing that the other party already has access, as sufficient. *Texas v. United States Steel Corp.,* 546 F.2d 626 (5th Cir.), *cert. denied,* 46 U.S.L.W. 3238 (1977); *A.B.C. Great Stores, Inc. v. Globe Ticket Co.,* 309 F. Supp. 181 (E.D. Pa. 1970); *Minnesota v. United States Steel Corp.,* 44 F.R.D. 559 (D. Minn. 1968).

While the Fifth Circuit, in *Texas v. United States Steel Corp., supra,* recently held that a grant of access with little if any showing of particularized need was an abuse of discretion, it recognizes that disclosure is proper if the material is needed for purposes such as impeaching a witness or refreshing recollection. *Allis-Chalmers Manufacturing Company v. City of Fort Pierce,* 323 F.2d 233, 238 (5th Cir. 1963). The Seventh Circuit, in a well-reasoned opinion with facts almost identical to those involved here, recently held a denial of access to be an abuse of discretion. *Illinois v. Sarbaugh,* 552 F.2d 786 (7th Cir.), *cert. denied sub nom. J.L. Simmons Co. v. Illinois,* 46 U.S.L.W. 3238 (1977).

U.S. Industries, Inc. v. United States District Court, supra, thus continues to provide the guidelines that courts generally follow. The question now is whether the

district court exercised its discretion within those guidelines.

The criminal case has been concluded, and, in contrast to the cases which the Supreme Court decided, the United States has no objection to disclosure. Douglas and Phillips already have all the materials requested by their adversary, and there is no indication that granting Petrol Stops' petition would expose witnesses to new sources of retaliation. The public-interest side of the balance therefore is lightly weighted.[4]

Petrol Stops showed a particularized need beyond the mere relevance of the materials. It showed that some of the answers Douglas and Phillips made to its interrogatories might contradict the charges in the indictment. Since Douglas and Phillips entered *nolo contendere* pleas, there is a strong inference that the grand jury materials support the government's charges.[5] The materials might thus be relevant for impeachment, one of the classic reasons for making them available.

On appeal Petrol Stops makes a stronger showing, pointing out inconsistencies between the government's bill of particulars and statements made in recent depositions. However, even at the district court, Petrol Stops did not seek the materials merely for a general fishing expedition. It made a sufficient showing of particularized

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[4] We think that the Central District of California court was the proper district court to consider the issue. It was best situated to evaluate the need for continuing secrecy and may have been the only court with jurisdiction under Fed. R. Crim. P. 6(e). *See Illinois v. Sarbaugh,* 552 F.2d at 772-73. The district court for the District of Arizona apparently hesitated to grant discovery of these materials because of its inability to evaluate the need for continued secrecy.

[5] In its petition Petrol Stops inaccurately stated that they pleaded guilty; we do not think that the different inferences to be drawn from the two pleas are great enough to matter here.

need, in light of the weakness of the reasons offered for opposing disclosure.

The district court recognized that some particularized need was necessary but that it did not have to be great. While it authorized disclosure, it imposed a stringent protective order limiting the persons to whom the materials could be disclosed and the uses Petrol Stops could make of them. This carefully limited disclosure was not an abuse of discretion. Denial of disclosure might well have been an abuse.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS OIL COMPANY OF CALIFORNIA; PHILLIPS PETROLEUM COMPNAY, *(sic)*

Appellants,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,

Appellees.

No. 77-2305

ORDER

Before: HUFSTEDLER, Circuit Judge.

Upon due consideration, the motion to supplement the record is denied and the material in issue may be lodged with the Court for such use as the panel which determines this appeal on its merits deems proper. Appellants are granted an extension of time through December 5, 1977 in which to file their reply brief.

(Signature)

United States Circuit Judge

No. 77-2305

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vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,

Appellees.

REPLY OF APPELLEES TO RESPONSE OF APPELLANTS IN OPPOSITION TO MOTION TO SUPPLEMENT RECORD ON APPEAL

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REPLY OF APPELLEES TO RESPONSE OF APPELLANTS IN OPPOSITION TO MOTION TO SUPPLEMENT RECORD ON APPEAL

INTRODUCTION

The lower court on May 17, 1977, granted appellees Petrol Stops, Gas-A-Tron, and Coinoco ("Petrol Stops") the same right of access to grand jury transcripts and documents previously granted to appellants Phillips Petroleum Company (hereinafter "Phillips") and Douglas Oil Company of California (hereinafter "Douglas"). Appellants seek to have this decision by the Honorable William P. Gray reversed. Appellees Petrol Stops on October 31, 1977, filed with their brief a motion to supplement the record. The two affidavits and excerpts from two depositions which appellees included as Exhibits A-D to their motion occurred *after* the May 17, 1977, Order of the lower court.

The May 17, 1977, Order of the lower court expressly provided that the grand jury materials could be used by Petrol Stops ". . . for the purpose of impeaching . . ." witnesses. (Order of May 17, 1977, at 3.) Events *subsequent* to the lower court's Order of May 17, 1977, have confirmed the importance of permitting appellees Petrol to use the grand jury materials already possessed by appellants Douglas and Phillips to establish the truth in the Arizona civil actions. Appellees Petrol Stops have submitted these new materials so that this Court might accurately assess the representations made to the district court and this Court by Douglas and Phillips.

1. *The Affidavits filed by a former government attorney subsequent to the designation of the record dispute appellants' representations that the grand jury materials are not relevant to the private antitrust civil*

actions in Arizona being prosecuted by appellees against Douglas and Phillips. Exhibits A and B to appellees motion are affidavits by Jonathan Nave, an attorney for the Antitrust Division of the U.S. Department of Justice who helped prepare the indictment and civil complaint against Douglas and Phillips. The August 26, 1977, affidavit, Exhibit B to Appellees' Motion, states that "the Government obtained considerable information concerning retail price-fixing of rebrand gasoline." (at 3.) Appellees allege, *inter alia* in their complaints in the Arizona actions that appellants Phillips, Douglas, and other co-conspirators had conspired to fix the retail price of gasoline sold in Washington, Oregon, California, and Arizona." Yet appellants Douglas and Phillips argued to the lower court that the ". . . question here is whether or not the materials sought by these plaintiffs (appellees Petrol Stops) are relevant . . ." (Transcript of Proceedings, March 28, 1977, at 9.) They have made the same argument to this Court. (Appellants' Brief at 8-12.) Since only Douglas and Phillips have actually seen and reviewed the grand jury materials, it is important for this Court to have the affidavit of Jonathan Nave to assess accurately the appellants' representations that the grand jury materials are irrelevant. Nave's affidavit demonstrates that Judge Gray's decision that the grand jury materials were relevant to appellees Arizona actions was correct.

2. *Appellant Douglas' acts subsequent to the March 28, 1977, hearing belie appellants' argument that the grand jury transcripts and documents are not relevant to the private antitrust civil actions in Arizona being prosecuted by appellees against Douglas and Phillips.* Douglas urges this Court to find that the grand jury materials are not relevant to appellees' Arizona actions. This argument is made in spite of the fact that Douglas' counsel used the same grand jury transcript in preparing

William J. Martin II for his deposition on October 25-26, 1977, in Los Angeles. If the grand jury materials were in fact irrelevant, counsel for Douglas would not have used them in preparing his clients' witness.

3. *Douglas employees have denied, in depositions taken after Judge Gray's decision, engaging in any of the conduct which resulted in the indictment and companion civil antitrust case established by the U.S. Government.* Phillips and Douglas pled *nolo contendere* to the indictment and a consent decree was accepted by Judge Harry Pregerson of the U.S. District Court for the Central District of California. Yet in Mr. Janecek's September 28, 1977, deposition, Exhibit C to appellees' motion, the testimony appears that he never had any conversations with William J. Martin, II to determine whether there had been contact with competitors of Douglas concerning the price at which gasoline was to be sold. Similarly, Mr. George Hopwood denied during his September 26, 1977, deposition, Exhibit D to appellees' motion, denied ever having any of the conversations listed by date and participants in the government's Bill of Particulars. These direct contradictions underscore the importance of affirming the lower court's May 17, 1977, Order permitting appellees to impeach testimony by Douglas and Phillips personnel.

4. *Rule 10(e) of the Federal Rules of Appellate Procedure provides for the modification of the record on appeal.* Questions regarding errors or inaccuracies "shall be submitted to and settled by that court and the record made to conform to the truth." (*Id.*) *Heath v. Helmick*, 173 F.2d 156 (9th Cir. 1949). However, Rule 10(e) goes on to provide that "[a]ll other questions as to the form and content of the record shall be presented to the court of appeal." That this authority to augment the record lies only in this Court was decided by this Court in

Munich v. United States, 330 F.2d 774 (9th Cir. 1964). Appellees Petrol Stops have presented a different question than mere correction of the record to this Court by filing their "Motion of Appellees to Supplement Record on Appeal" and "Proposed Order."

The question is whether appellants should be permitted to argue that the grand jury materials are not relevant and *then*, after the lower court's decision, to take actions which refute that argument. Appellants had the grand jury materials before they argued the relevancy question to the lower court, but it was only *after* the time for designation of the record on appeal had passed that their actions contradicted the argument. Appellants might have argued that circumstances changed between the time of the lower court's Order and their inconsistent actions. But appellants do not make that argument. Instead they repeat the relevancy argument to this Court in their Brief at 8-12.

Under Rule 10(e) this Court has the express authority to modify or supplement the record on appeal. That is what appellees Petrol Stops seeks in its instant motion.

5. *This Court also has the inherent power to supplement the record beyond the authority granted in Rule 10(e).* In *Phillips Petroleum Company v. Williams*, 159 F.2d 1011 (5th Cir. 1947) the court considered its inherent power within the context of revisions of its local rules and the predecessor to Rule 10(e):

> This court has ample authority, too, to supplement the record if there has been omitted from it matter which is deemed necessary or appropriate in the decision of the case. (at 1012)

CONCLUSION

The material presented to the Court by appellees' motion to supplement the record confirms the relevancy of the grand jury materials to appellees' civil actions in Arizona. Exhibits A-D of Petrol Stops' motion demonstrates that appellants have taken actions after the lower court's decision which belie their argument that the materials are not relevant. This Court has the authority, either under Rule 10(e) or through the exercise of its inherent power, to supplement the record pursuant to appellees' motion.

DATED: November 11, 1977

Respectfully submitted,

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No. 77-2305

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Appellees.

RESPONSE OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO SUPPLEMENT RECORD ON APPEAL

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RESPONSE OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO SUPPLEMENT RECORD ON APPEAL

On or about October 31, 1977, Appellees Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco served a Motion of Appellees To Supplement Record on Appeal. Appellees wish to supplement the record in this case (Misc. No 5706 in the Central District of California) with two affidavits filed in another case (Civ. No. 75-974-HP in the Central District of California) and with excerpts of two unsigned deposition transcripts in yet another case (Civ. No. 73-212 TUC-JAW in the District of Arizona). Each of the items Appellees wish to add to the record in this case originated after the appeal was taken to this Court from the District Court's order of May 17, 1977. For the reasons stated below, Appellants oppose the motion and urge that it be denied.

Rule 10(e), Federal Rules of Appellate Procedure, provides the procedure for supplementing the record on appeal. It states:

> If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

Rule 10(a) defines the record on appeal. It states:

> The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Appellees in their present motion are not attempting to provide something that has been "omitted from the record by error or accident" nor are they attempting to correct something that has been "misstated therein." In fact, they are attempting to augment the record by adding matter wholly extraneous to the record, matter that has never been a part of the record in this case in the district court below and even matter that is involved in an action in a wholly different court than below — and that matter is not even a part of the record in that different district court.

The purpose of Rule 10(e) is to provide for bringing to this Court's attention matters that were in fact part of the case being reviewed, but that have been omitted from the record by error or accident or have been misstated in the record.[1] That rule was clearly not designed to permit a party to go rummaging through the world at large for whatever he thinks might be of some benefit to him.

The reason for the rule is simple and obvious: this Court is called upon to review a decision made below. To determine whether the judge below made the correct ruling this Court must have the same data that he had or at least so much of that data that the parties deem relevant. Judge Gray had none of the materials Appellees wish to introduce to this Court before him when he ruled. He obviously did not consider them when he ruled. In reviewing Judge Gray's order this Court should have before it those pleadings and exhibits that were presented to Judge Gray and an exposition of the controlling law. This Court is not being called upon to consider what Judge Gray might have ruled if he had a record different than the one he actually had. This Court is called upon to rule upon the same record Judge Gray had.

[1] A proper utilization of Rule 10(e) is the motion of August 8, 1977, in which this Court was asked to permit inclusion of the Reporter's Transcript of the hearing before Judge Gray in the court below on Appellees' petition, which Transcript had been "omitted from the record by . . . accident."

Moreover, the proffered material is wholly without any probative value in this case. Exhibit A, the first Nave affidavit, merely states who the affiant is, why he filed his affidavits in Civ. No. 75-974-HP and that the original second affidavit was filed *in camera*. Exhibit B, the second Nave affidavit, recites allegations about matters investigated by the government, but for which no indictment was returned. There is no indication in that affidavit that either Douglas Oil Company of California or Phillips Petroleum Company is the subject of any of the allegations, nor that the allegations were based upon grand jury testimony of employees of either of those companies nor that the allegations were based upon documents provided by either of those companies. Documents were provided by many more companies than just Douglas and Phillips. Exhibits C and D, the deposition transcript excerpts, are unsigned portions of testimony of two present Douglas employees, depositions taken in a civil action pending in Arizona, taken after the Order appealed from in this case was entered and taken after the transmittal of the record to this Court. Whatever their relevance and value may have been had they been presented to Judge Gray, they are completely irrelevant to a review of the May 17, 1977 Order.

To grant the motion of Appellees to supplement the record by inclusion of those extraneous materials would completely disrupt the orderly handling and considera-

tion of appeals. The appellate function is to review what transpired in the court below and measure it against controlling legal principles. The Appellees chose to bring on their petition when they did and they presented their case as they saw fit. Based on their petition and presentation, the district court ruled. There must be some finality to trials and hearings. Litigants should not be permitted to continue introducing newly created, post-judgment evidence after the court has ruled and an appeal commenced. Some of Appellees' proffered material came into existence even after the opening brief was filed in this appeal.

For the reasons that the proposed augmentation is wholly outside the record of the case below and beyond the coverage of Rule 10, that the material was created after the Order appealed from was entered and the appeal commenced and in proceedings other than those in the court below, it is urged that the motion of the Appellees to supplement the record on appeal be denied.

DATED: November 4, 1977.

Respectfully submitted,
EVANS, KITCHEL & JENCKES, P.C.

By HAROLD J. BLISS, JR.

Harold J. Bliss, Jr.
Attorneys for Defendant-Appellant Phillips Petroleum Company

On Behalf of Phillips Petroleum Company and Douglas Oil Company of California

No. 77-2305

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS OIL COMPANY OF CALIFORNIA;
PHILLIPS PETROLEUM COMPANY,

Appellants.

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA; COINOCO; UNITED STATES OF AMERICA,

Appellees.

MOTION OF APPELLEES TO SUPPLEMENT RECORD ON APPEAL; PROPOSED ORDER

BERMAN & GIAUQUE
DOUGLAS J. PARRY
GORDON STRACHAN
500 Kearns Building
Salt Lake City, Utah 84101
Telephone: (801) 533-8383

Attorneys for Appellees
Petrol Stops Northwest;
Gas-A-Tron of Arizona; Coinoco

MOTION OF APPELLEES TO SUPPLEMENT RECORD ON APPEAL

Appellees Petrol Stops Northwest, Gas-A-Tron, and Coinoco (hereinafter "Petrol Stops") respectfully move this Court for an order to supplement the record on appeal on the grounds that significant events have occurred since the record on appeal was designated on June 10, 1977.

On May 17, 1977, the Clerk of the U.S. District Court for the Central District of California entered the Order of the Honorable William P. Gray, which is the subject of the appeal by Phillips Petroleum Company (hereinafter "Phillips") and Douglas Oil Company of California (hereinafter "Douglas"). This Court on June 30, 1977, stayed the district court's order of May 17, 1977, pending appeal and the Clerk was directed to expeditiously calendar the appeal upon completion of briefing.

The May 17, 1977, Order, which is the subject of the instant appeal, grants to appellees Petrol Stops the same right of access to grand jury transcripts and documents previously granted to Douglas and Phillips in connection with a criminal antitrust prosecution, terminated by pleas of *nolo contendere* on December 3, 1975. United States v. Phillips, et al., Criminal No. 75-377 MML. The companion civil action filed by the Department of Justice Antitrust Division was settled pursuant to a proposed consent decree U.S. v. Phillips, et al., Civil No. 75-974-HP. During the consideration by the Honorable Harry Pregerson of whether the proposed consent decree was in the public interest, a former attorney for the Department of Justice Antitrust Division, Jonathon P. Nave, submitted two affidavits challenging the representations made to the court by the government and the defendants, incuding appellants Phillips and Douglas. These affi-

davits, dated August 22, 1977, and August 26, 1977, directly contradict the answers to interrogatories filed by Phillips and Douglas in the private Arizona actions in which Petrol Stops are plaintiffs. *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 TUC-JAW, *Gas-A-Tron of Arizona and Coinoco v. Union Oil Company of California*, et al., Civil No. 73-191 TUC-WCF. Since Judge Gray granted Petrol Stops access to these grand jury transcripts and documents in part to enable appellees to impeach these false answers to interrogatories, these affidavits should be considered by this Court.

The affidavits were prepared *after* the time for appellants and appellees to designate the record pursuant to Rule 10 of the Federal Rules of Appellate Procedure. Appellees have included these affidavits as Appendix A and Appendix B to their Brief filed simultaneously with this motion.

Similarly, depositions of two employees of appellant Douglas occurred on September 26-28, 1977; again, *after* the date for designation of the record on appeal. Testimony developed during these depositions again bears directly upon the accuracy of the answers to interrogatories filed by Douglas and Phillips in the Arizona civil actions. Therefore, this testimony should be before this Court to enable it to assess appellees' particularlized need for access to the grand jury transcripts and documents to establish the truth in the face of false answers to interrogatories. Appellees have included portions of these two depositions as Appendix C and Appendix D respectively to their Brief filed simultaneously with this motion.

Copies of Appendixes A, B, C, and D are attached to this motion for the convenience of the Court.

DATED: October 31, 1977

Respectfully submitted,

BERMAN & GIAUQUE
DOUGLAS J. PARRY
GORDON STRACHAN
500 Kearns Building
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Telephone: (801) 533-8383

By: GORDON STRACHAN
Gordon Strachan
Attorneys for Appellees
Petrol Stops Northwest;
Gas-A-Tron of Arizona; Coinoco

PROPOSED ORDER TO SUPPLEMENT THE RECORD ON APPEAL

Upon the motion of appellees for an order supplementing the record on appeal, and good cause appearing,

IT IS ORDERED that the record on appeal be supplemented by the addition of the Affidavits of August 22, 1977, and August 26, 1977, of Jonathon P. Nave, and the excerpts from the depositions of Lionell J. Janecek of September 28, 1977, and George E. Hopwood of September 26-27, 1977, attached to appellees' Brief as Appendixes A, B, C, and D respectively.

DATED: .....

.....
United States Court of Appeals

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* vs. PHILLIPS PETROLEUM COMPANY; DOUGLAS OIL COMPANY OF CALIFORNIA; POWERINE OIL COMPANY; GOLDEN EAGLE REFINING COMPANY, INC.; AND MACMILLAN RING-FREE OIL CO., INC. *Defendants.*	AFFIDAVIT OF JONATHON P. NAVE Civil No. 75-974-HP

The undersigned, Jonathon P. Nave, being duly sworn, does swear and testify as follows:

1. My name is Jonathon P. Nave. I am an attorney duly licensed in California and admitted to practice before the Courts of the State of California and this Court. During the period from October 1971 through September 15, 1974, I was a staff attorney for the United States of America assigned to the Antitrust Division office of the Department of Justice in Los Angeles, California. During a portion of this period, beginning approximately in the Fall of 1972 and extending to September 15, 1974, a portion of my duties included investigation into alleged antitrust violations concerning the gasoline industry.

2. I have been provided a copy of the Competitive Impact Statement filed by the United States in Civil No. 75-974-HP, and have been asked by counsel for *amicus curiae,* Petrol Stops Northwest and Gas-A-Tron, to comment on the statements contained therein.

3. I have examined the Competitive Impact Statement, and believe the Court is entitled to additional

information concerning the representations contained at page 5, lines 15 through 23, and particularly line 20, and page 6, lines 1 through 10, and particularly line 5 therein, before deciding whether the proposed consent decree is in the public interest.

4. Federal Rules of Criminal Procedure, Rule 6(e) "Secrecy of Proceedings and Disclosure" appears to apply to the information gained by me not only from witnesses appearing before a grand jury, but also to information gained and compiled pursuant to my grand jury authority. For that reason, the particular information is not contained in this affidavit. It is supplied to the Court, with a copy to the attorneys for the United States, for inspection by the Court *in camera.*

5. Further affiant sayeth not.

Dated: August 22, 1977.

JONATHON P. NAVE

Jonathon P. Nave

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

On the 22nd day of August, 1977, before me, a Notary Public in and for said County and State, personally appeared Jonathon P. Nave, known to me to be the person who executed the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

TSUYOKO OTA

[Notarial Seal] Notary Public in and for Said County and State.

My Commission expires Jan. 16, 1979

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* vs. PHILLIPS PETROLEUM COMPANY; DOUGLAS OIL COMPANY OF CALIFORNIA; POWERINE OIL COMPANY; GOLDEN EAGLE REFINING COMPANY, INC.; AND MACMILLAN RING-FREE OIL CO., INC. *Defendants.*	AFFIDAVIT OF JONATHON P. NAVE Civil No. 75-974-HP

COMES NOW, JONATHON P. NAVE, and being duly sworn, deposes and says:

1. I am the same person who filed an affidavit with the Court in the above-entitled matter on August 22, 1977. This affidavit is the affidavit referred to in paragraph 4 therein.

2. This affidavit is submitted in connection with that portion of the Government's Competitive Impact Statement filed in the above-entitled case which reads:

> ". . . Since the Government did not develop evidence or price-fixing with respect to gasoline other than rebrand gasoline, . . ." (Page 5, lines 20-21).

3. During my employment by the United States Department of Justice, I received and/or obtained information concerning the operation of refiners and marketers of gasoline in the five western states of California, Oregon, Washington, Arizona and Nevada. This information may be classified into several categories:

a. Documents and testimony from various individuals and corporations pursuant to grand jury subpoenae.

b. Documents and other information received from individuals and companies that were not furnished in response to grand jury subpoenae.

c. Interview notes, memoranda, and transcripts of interviews.

d. Compilations derived from interviews, testimony and documents.

e. Staff memoranda.

4. During staff discussions of the investigation, those of us assigned to the investigation decided to concentrate on rebrand "rack" pricing first, since that was the first particular complaint brought to the attention of the Government. However, nearly all the persons who furnished documents or provided information concerning "rack" pricing also provided information and/or documents concerning other potential violations of the antitrust laws. Included in these other areas were:

a. Retail pricing by both rebranders and majors,

b. The effect of exchange agreements on wholesale and retail rebrand sales, and

c. The actions of certain defendants to prevent a major rebrander from obtaining an import quota from the Oil Import Appeals Board.

The documents, notes and memoranda on each of these areas are or were contained in Government files. Some were returned to the companies that supplied them while I was still employed by the United States.

5. During the period prior to the indictment and filing of this civil suit, the Government obtained con-

siderable information concerning retail price-fixing of rebrand gasoline. In fact, more information was received from participants involved in retail rebrand price-fixing than any other aspect of the investigation. Included in the information received by the Government, among other things, were:

a. Minutes of trade groups meetings (composed of rebranders, some major dealers, some major distributors, and refiner representatives), and testimony concerning straight forward discussions at those meetings of the dates and amounts of retail price restorations.

b. Interviews and testimony of rebrand operators concerning discussions and agreements to increase retail rebrand prices, mostly by telephone.

c. Retail pricing documents of a refiner obtained in connection with its attempts to obtain retail price restoration in order to ensure the success of wholesale price increases.

d. Testimony from representative of at least one refiner that retail price restorations were enforced by pressuring customers who had not restored retail prices. Recipients of such calls testified to receiving them. The refiner representative also indicated to us that a strong retail market was a necessity before a wholesale "rack" price increase could be expected to "hold."

e. Transcripts and interviews concerning communications and agreements to raise retail prices just prior to Phase One of the Government's price freezes, as a result of and following information obtained (allegedly from the Executive Office of the President) prior to the price freeze. This information was given to the grand jury by a representative of a refiner who participated in discussions concerning whether or not the information should be passed on to competitors and

customers. Customers of this refiner testified they received such calls.

6. We also received information concerning certain activities of major refiners concerning retail price increases, occasionally in conjunction with rebrand wholesale pricing, and invariably involving the same persons identified by others as participants in the conspiracy to increase the wholesale "rack" price. Included in this class of information are:

a. Interviews of an employee of a major, who discussed being contacted by and contacting representatives of other majors and rebranders concerning the prices charged by individual stations. As an example of such a communication, he would call a competitor, or receive such a call, and ask "Do you have a special deal going for station X?" If he received such a call, and did not have some special deal for that station, he would inform the service representative in charge of the offending dealer for the purpose of having the representative visit the dealer to persuade the dealer to raise his low prices.

Others, including the representative of a trade group, stated he made similar calls.

A representative for one of the defendants also made such calls and received such calls. That employee, a former service representative and area representative of a major, indicated that this was a wide-spread industry practice.

Several individual station dealers indicated that the contacts from the service representative took a wide variety of forms, such as promises to stand up for the dealer on restroom complaints or other complaints that could cause a dealer to lose his lease. One such dealer indicated that his lease contained a

"three-complaint" clause, allowing the refiner to cancel his lease on receiving three complaints of unclean restrooms.

b. A transcript of a deposition by a former official of a major, in which the official alleged meetings occurred regularly among representatives of majors at various places in California, Oregon, and Washington where specific information concerning each others low priced stations was exchanged with the intent that each company would pressure its low-price stations to increase prices.

7. There were also a number of items relating to the effect of exchanges on rebrand pricing and supply. Among these are:

a. A project study of a major in which, as a part of an attempt to increase the return on investment at the retail level, an economic study of exchanges which fed the "bootleg market" was urged. The study is dated shortly before one of the exchange partners began to limit the supply and distribution points of its two largest distributors.

b. A memorandum from the head of the exchange department to the head of the wholesale marketing department of a California refiner, explaining why and how exchanges and bulk sales can and should be used to create a "floor" below which rebrand rack prices would not fall, and explaining why they should not solicit the wholesale rack business of other refiners. This latter injunction was similar to statements received from executives of other refiners.

8. The Government also investigated the activities of several refiners in opposing a finished product import quota for an aggressive rebrand marketer.

In the late 1960's, a California marketer was able to secure a gasoline supply from a midwest refiner. The Government received a number of documents and testimony that several refiners engaged in joint activities to oppose the necessary application for an inter-district import quota from the Oil Import Appeals Board.

Also included in documents produced to the Government were contemporaneous notes of a telephone conversation between the rebrander and the refiner. The general tenor of the conversation was that the rebrander could not pay the amount it owed for the gas it had purchased because it was unable to sell it for a higher price in California due to the low price being charged at the rack by a competitor. According to the notes, the refiner indicated that he was coming to California in the next few days and would talk to the competitor about raising the rack price.

There were also statements indicating that several refiners contracted with the refiner (after the rebrander received its import quota) to produce jet fuel rather than gasoline, for which the small local refiners who were eligible for the "set aside" portion of the Government's jet fuel contracts would bid and exchange jet fuel for gasoline to be delivered to the midwest refiner on the west coast. The local refiners were then able to control the distribution points (hence the transportation costs and amount available in a given area) and were able to negotiate a stable value for the gasoline due to the ratio expressed in the exchange agreement.

9. The Government also received a number of communications and statements from individuals connected with the oil industry, concerning other potential violations of the antitrust laws. Included among these were:

a. Allegations that refiners were imposing limits on "crosshauling," including a tape by a major dealer

in which the service representative explained to him that he would not be allowed to "crosshaul" in the Los Angeles market because the practice had the effect of ruining otherwise stable areas in the Los Angeles Basin.

b. An allegation by a former employee of a smaller oil company that he had attended a meeting in which representatives of most of the major oil companies agreed to include the cost of credit cards in the price of crude oil so that the retail price differential between majors who were going to offer credit cards, and rebranders, who would not offer credit, would not increase.

10. I have not worked for the United States since September, 1974. Unfortunately, my memory is not perfect. Therefore, this affidavit is made in accordance with my recollection of various aspects of the investigation conducted by the Government, most of which was conducted prior to Summer, 1974.

11. Further affiant sayeth not.

DATED: August 26, 1977.

JONATHON P. NAVE

Jonathon P. Nave

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

On this 26th day of August, 1977, before me, a Notary Public in and for said County and State, personally appeared Jonathon P. Nave, known to me to be the person who executed the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

JOERLINE MIRALLES

Notary Public in and for Said County and State.

OFFICIAL SEAL
JOERLINE MIRALLES
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires APR 7, 1981

APPENDIX C

[As submitted by respondents]

BE IT REMEMBERED that pursuant to notice for taking depositions in the above styled and numbered cause, the deposition of LIONELL J. JANECEK was taken upon oral examination at the law offices of Messrs. Latham & Watkins, 660 Newport Center Drive, in the City of Newport Beach, County of Orange, State of California, before Peter L. DiCurti, a Notary Public in and for the County of Pima, State of Arizona, on the 28th day of September, 1977, commencing at the hour of 11:10 a.m. on said day, on behalf of the Plaintiff in a certain cause now pending in the District Court for the District of Arizona.

MR. PARRY: Can we go on the record?

MR. NORRIS: On the record. In view of the fact that this deposition is being taken in Newport Beach, California, I would suggest to the parties that it might be well to stipulate that the deposition can be signed before any Notary authorized to administer oaths in this jurisdiction, rather than having it signed before the Reporter who took the deposition, if that's acceptable to all parties.

MR. DORMAN: Is that acceptable, Doug?

MR. PARRY: Agreed.

* * * * [page 3]

did I at that time, have any reason to question the answer that the coordinator provided?

Q (By Mr. Parry) Okay. I will ask that question. What is the answer?

A I had no reason to question it.

Q Did you make any investigation, independent investigation of Mr. Dan Myers to determine whether the answer was true or not?

A I worked with Mr. Myers on this collection of data.

Q Okay. Specifically, as to Interrogatory No. 82, dealing with the discussions with major oil companies concerning the rack and spot price of gasoline, what did you do in working with Mr. Myers?

A Well, as to being able to verify to myself that the questions had been asked of those people, or parties, who would have that knowledge, I would have asked two or three or four of them just to make sure that they had been asked the question, and that they could substantiate the answers that were provided.

A Did you —

Q Yes.

Q — ask two or three or four of them?

A Yes.

* * * * [page 16]

during May of 1974?

A I believe Mr. Martin was no longer with the company on that date.

Q Your best recollection is that you did not contact him concerning the Answers *(sic)* to Interrogatories, any Answer to any Interrogatories 77-82?

A To the best of my recollection, no.

Q Did you make any search of any documents or records of Douglas Oil Company to determine what the answers to, whether the answers given to you to Interrogatories 77-82 were correct?

MR. DORMAN: Are you asking him specifically whether he personally, or whether Dan Myers?

MR. PARRY: No, he personally.

MR. DORMAN: Okay.

A And the question was dealing with records?

Q (By Mr. Parry) Yes, any documents.

A No.

Q Do you know whether Dan Myers made any investigation of any records of Douglas Oil Company to determine the Answers to Interrogatories 77-82?

A No, I don't know.

Q Did Mr. Myers tell you that he had gone through any file to determine the Answers to those Interrogatories?

* * * * [page 21]

not in evidence.

A Any other oil company? Are you talking about any other oil company as being a manufacturer or refiner of product?

Q (By Mr. Parry) Any, any other oil company. The question is whether you had any conversation with Mr. Martin concerning any agreement between Douglas and any other oil company concerning the price at which Douglas and that other oil company would resell refined petroleum products at wholesale in Washington, Oregon or California?

MR. MUNTER: Objected to as assuming a fact not in evidence.

A With the emphasis, as you have placed on the words, no, and thank you, because I didn't hear that.

Q (By Mr. Parry) Well, if I didn't put an emphasis on those words, and just said them all in a monotone, would your answer be different?

A Well, I think of oil companies as being Armour Oil Company, James White Oil Company, and --

Q My question includes those.

A I understand that. But you are talking about any other oil company for the resale by these two companies, and —

Q Correct.

* * * * [page 89]

A And the answer is absolutely no.

Q It would also include —

A If you are talking about the sale, or sale for resale, the answer is obviously probably yes.

Q But no, I am not. And I am including Douglas, Powerine.

A No.

Q Do you recall ever having a conversation with Mr. Martin concerning the availability of refined petroleum products to, for resale by any company, to any independend, no, no independent, rebrand marketer in Washington, Oregon or California?

MR. MUNTER: Could I hear the question? I didn't understand.

(Pending question read by the Reporter.)

MR. PARRY: Let me rephrase the question, because I want to narrow it down.

Q (By Mr. Parry) Do you recall of any conversations which you had with Mr. Martin concerning the availability of refined petroleum products for resale to rebrand marketers of refined petroleum products in Washington, Oregon or California, other than in relationship to a purchase, or an attempt to purchase refined petroleum products from Douglas by a customer of Douglas?

MR. DORMAN: I object to the form of the

* * * * [page 90]

with Don Parker.

Q In verifying the Answers to Interrogatories do you solely rely on Mr. Myers' representation to you that any single answer to Interrogatory was true, without you making a personal investigation, other than through Mr. Myers?

A I believe you have asked, and I have answered that.

Q The answer is yes?

A Yes. Wait, no, no, no, no. Read that question, because — read the last question, not the question he just asked, but the very last question.

MR. LEVY: It goes back, it's the whole question of Dan Myers.

Q (By Mr. Parry) Well, what I am really trying to ask is, originally you said —

A Did I rely on him, is that your question?

Q My question was whether there were some Answers to Interrogatories that you didn't make any independent investigation or verification whatsoever, but relied solely on Dan *(sic)* Myers' representations to you?

A I don't think there were any questions, so the answer was not yes, it's no.

MR. PARRY: Then I have no further questions.

* * * * [Page 93]

STATE OF ARIZONA }
COUNTY OF PIMA } ss:

BE IT KNOWN that I, PETER L. DICURTI, took the foregoing deposition pursuant to notice at the time and place stated in the caption hereto; that I was then and there a Notary Public in and for the County of Pima, State of Arizona; that the witness, LIONELL J. JANECEK, before testifying was duly sworn to testify the truth, the whole truth and nothing but the truth, by a duly qualified Notary Public in and for the County of Orange, State of California; that the testimony of said witness was reduced to writing under my direction; that the foregoing 94 pages contain a full, true and correct transcription of the notes of said deposition.

I FURTHER CERTIFY that I am not of counsel nor attorney for either or any of the parties to said action or otherwise interested in the event thereof, and that I am not related to either or any of the parties to said cause.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my seal of office this 6th day of October, 1977.

_____
Notary Public

My *(sic)* Commission Expires:
February 2, 1981.

• • • • [Page 95]

APPENDIX D

[As submitted by respondents]

BE IT REMEMBERED that pursuant to notice and stipulation for taking depositions in the above styled and numbered cause, the deposition of GEORGE E. HOPWOOD was taken upon oral examination at the law offices of Messrs. Latham & Watkins, 660 Newport Center Drive, in the City of Newport Beach, County of Orange, State of California, before Peter L. DiCurti, a Notary Public in and for the County of Pima, State of Arizona, on the 26th day of September, 1977, commencing at the hour of 10:30 a.m. on said day, on behalf of the Plaintiff in a certain cause now pending in the District Court for the District of Arizona.

GEORGE E. HOPWOOD

a witness produced by the Plaintiff as an adverse party on cross examination, after having been first duly sworn to state the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

CROSS EXAMINATION

BY MR. PARRY:

Q Mr. Hopwood, my name is Douglas Parry. I represent the Plaintiff, Petrol Stops Northwest, in a lawsuit which involves the company by whom

• • • • [Page 3]

of Douglas Oil Company in attendance?

A I think all of them.

Q Can you recall in 1970, aside from yourself, who attended the Pacific Oil Conference in Nevada on behalf of Douglas Oil Company?

A I did, and I think Bill Miller, and I'm not sure who else, but there may have been others. I'm not sure.

MR. PARRY: Could you read back my question, please?

(Question, beginning on line 3, ending line 5, read by the Reporter.)

A I'm not really sure. I didn't know how many.

Q (By Mr. Parry) Let me refresh your — ask a few more questions.

MR. DORMAN: Just so the record is clear, while you were reading back the question I was asking him specifically to, can he peg that date of 1970 in the oil conference to a particular person attending with him, if he was sure of that, because that was precisely what you asked.

MR. PARRY: Okay. Let me give some background.

Q (By Mr. Parry) In the 1970 conference, as I understand it, it was held in Reno, Nevada.

* * * * [page 208]

Do you recall that being where it was held?

A Not in Reno, no.

Q Sparks, Nevada?

A Sparks.

Q At this conference, was that the first time you had met a man by the name of Ken Galligan?

A I don't recall meeting Ken Galligan.

Q Have you ever met Ken Galligan?

A I met him once, to my knowledge.

Q Where was that?

A In the Courtroom of the United States against George Hopwood.

Q You don't recall meeting him in the hospitality room of the —

A I don't recall meeting him, no.

MR. PARRY: Can you staple this and mark it next, please?

(Plaintiff's Douglas Exhibit No. 7 stapled and marked for identification.)

MR. WELLS: I wonder if we could have Mr. Galligan's last name spelled, please?

MR. DORMAN: G-a-l-l-i-g-a-n.

Q (By Mr. Parry) Referring to — let me ask him a couple of introductory questions, and then you can have it.

Referring to Exhibit 7, which are three pages

* * * * [page 209]

Q Aside from the fact that you might not remember the names of the individuals that you went to lunch or dinner with, was there any other reason that you did not write down the names of the individuals?

A No other reason whatsoever.

Q Where are the Exhibits, please?

(Exhibits pointed out by the Reporter.)

Q To your recollection, Mr. Hopwood, have you ever had a telephone conversation with Mr. Kenneth Galligan?

A Not that I recall, no.

Q Is your recollection such that you can deny that you have ever had a telephone conversation with Mr. Galligan?

A Yes.

Q Do you know with, or by whom, Mr. Galligan was employed in the period 1970 — 1972?

A Yes. Well, I'm not sure about '72, but it was my understanding he was employed by Powerine in 1970.

Q On what do you base that testimony?

A Based on the testimony in Court when I was on trial.

Q Have you ever had any discussions with Mr. Martin concerning Mr. Kenneth Galligan?

• • • • [page 289]

STATE OF ARIZONA }
County of Pima } ss:

BE IT KNOWN that I, PETER L. DICURTI, took the foregoing deposition pursuant to notice and stipulation at the time and place stated in the caption hereto; that I was then and there a Notary Public in and for the County of Pima, State of Arizona; that the witness, GEORGE E. HOPWOOD, before testifying was duly sworn to testify the truth, the whole truth and nothing but the truth by a duly qualified Notary Public in and for the County of Orange, State of California, that the testimony of said witness was reduced to writing under my direction; that the foregoing 367 pages contain a full, true and correct transcription of the notes of said deposition.

I FURTHER CERTIFY that I am not of counsel nor attorney for either or any of the parties to said action or otherwise interested in the event thereof, and that I am not related to either or any of the parties to said cause.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my seal of office this 5th day of October, 1977.

_____
Notary Public

My Commission Expires:
February 2, 1981.

• • • • [page 368]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA, et al.,
Real Parties In Interest.

ORDER
Miscellaneous
No. 5706

The petition to inspect and copy transcripts of grand jury testimony and documents produced by Phillips Petroleum Company and Douglas Oil Company of California to the Antitrust Division, Department of Justice or to the federal grand jury issuing the indictment in *U.S. v. Phillips, et al.*, Criminal Docket No. 75-377, came on for hearing before this Court, the Honorable William P. Gray, District Judge, presiding. All parties being represented by counsel and the issues having been duly briefed and argued to the Court and the Court being fully advised, hereby orders *(sic)* and adjudges:

IT IS HEREBY ORDERED AND ADJUDGED that the Petition for Production for Inspection of the Transcripts of Grand Jury Testimony and Documents Produced Pursuant to Grand Jury Subpoena filed by petitioners on December 15, 1976 is granted; and

(1) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and copying all grand jury transcripts previously disclosed to Phillips Petroleum Company or Douglas Oil Company of California or their attorneys relating to the

indictment in *United States v. Phillips, et al.*, Criminal Docket No. 75-377;

(2) The Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice is hereby ordered to produce for petitioners' inspection and copying all documents produced by Phillips Petroleum Company or Douglas Oil Company of California to the government in connection with the grand jury investigation resulting in the indictment in *United States v. Phillips, et al.*, Criminal Docket No. 75-377;

(3) All transcripts, documents or information contained in any transcript or document produced pursuant to this Order shall be disclosed only to counsel for petitioners in connection with the two civil actions, *Gas-A-Tron of Arizona, et al. v. Union Oil Company of California, et al.*, Civil No. 73-191 TUC-WCF, and *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 TUC-JAW, now pending in Arizona, and the documents, transcripts or information contained therein may be used by them solely for the purpose of prosecuting or defending against claims in the *Gas-A-Tron* and *Petrol Stops* lawsuits. The transcript of the testimony of each grand jury witness produced pursuant to this Order may be used in such cases solely for the purpose of impeaching that witness or refreshing the recollection of a witness, either in deposition or at trial.

(4) No transcript or copy provided pursuant to this Order shall be further copied or reproduced in whole or in part and every transcript or copy produced hereunder shall be returned to the Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice upon completion of the purposes authorized by this Order.

DATED this 4th day of May, 1977.

WILLIAM P. GRAY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM P. GRAY,
JUDGE PRESIDING

PETROL STOPS NORTHWEST, et al., *Petitioners.*	
vs.	
UNITED STATES OF AMERICA, *Respondent.*	Miscellaneous No. 5706
DOUGLAS OIL COMPANY OF CALIFORNIA, et al., *Real Parties In Interest.*	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, March 28, 1977

BEN NEWLANDER
Official Reporter
404 U. S. Court House
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(213) 622-5545

APPEARANCES:

On behalf of petitioners:

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DOUGLAS J. PARRY, ESQ.

On behalf of respondent:

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Deputy Attorney General

On behalf of Douglas Oil Company:

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Los Angeles, California 90071, by
MORRIS THURSTON, ESQ.

On behalf of Phillips Petroleum Company:

EVANS, KITCHEL & JENCKES, P.C.
363 North First Avenue
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HAROLD J. BLISS, JR., ESQ.

and

ADAMS, DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014, by
JOHN H. BRINSLEY, ESQ.

LOS ANGELES, CALIFORNIA,
MONDAY, MARCH 28, 1977; 2:00 P.M.

THE CLERK: Item No. 18, Miscellaneous 5706, Petrol Stops Northwest v. United States of America and others. Motion of petitioner for production, inspection, et cetera of grand jury transcripts.

MR. THURSTON: Good morning, your Honor. I am Morris Thurston of Latham & Watkins for I guess the real party in interest Douglas Oil Company.

THE COURT: All right. You are the fellow that wrote that very able brief.

MR. THURSTON: I am not certain about that, your Honor. I have here also Mr. Bliss. I am not sure whose brief you are referring to so I hate to take credit for his work. Mr. Bliss represents Phillips Petroleum.

THE COURT: Good afternoon, Mr. Bliss.

MR. BLISS: Good afternoon, your Honor.

MR. PARRY: Your Honor, my name is Douglas Parry. This is Daniel Berman. We represent the petitioners in this action.

THE COURT: Yes.

MR. HERNACKI: Raymond Hernacki on behalf of the Antitrust Division. I think I am just a bystander in this proceeding, your Honor.

THE COURT: All right. Gentlemen, I will be glad to hear such arguments as you might find appropriate. Rather than have you argue in a vacuum, suppose I give you the Court's impressions, having read your papers.

In the first place, I think this Court has full jurisdiction to consider the matter. The defendants Phillips and Douglas raised that point. As a matter of fact, if Judge

Holtzoff is right, and he was a pretty good judge in the District of Columbia, this court would be the only one that would have jurisdiction. That is what he said in the case of Herman Schwabe, Inc. v. United Shoe Machinery.

And the Seventh Circuit in the In Re April 1956 Term Grand Jury also expressed the view that the court where the grand jury sits is the one that has jurisdiction. I think there is considerable reason for that. Although personally I have no information about the considerations of problems that the grand jury had when they considered this matter, presumably the judge who was the criminal duty judge at that time might well have had some knowledge of what the grand jury was considering and the problems in connection with it. But certainly the criminal duty judge of this court is better able to determine the sensitivity of grand jury proceedings than is a court in another district.

In any event, I conclude that I have jurisdiction over the matter and am disposed to proceed with that in mind.

With respect to the merits, the Procter & Gamble case says that the petitioners must show a particularized need. As I think it was Justice Douglas in that case said, this requires a lot of balancing.

First, it seems to me that seeking to obtain this information for purposes of impeachment constitutes a valid purpose in itself. The District Court in the Northern District of Illinois, Judge Ed Robson, had almost this very same problem in the case of In Re Cement Concrete Block at 381 F.Supp, almost the identical problem, and he concluded that the expression of need to hear what these employees have said before the grand jury in order that they might be prepared to impeach their testimony is a valid basis for seeking the information given by such employees at the grand jury hearing. His opinion is also relevant in another respect that I will mention in just a minute.

Also, another thing to consider in doing this balancing is the validity or the pertinence of the reasons for maintaining secrecy of grand jury proceedings.

In Judge Barnes's opinion in the Ninth Circuit case of U. S. Industries v. The United States District Court for the Southern District of California, Judge Barnes, just as Judge Robson did in the case that I just mentioned, talked about five classic reasons for secrecy in grand jury proceedings. The first is to prevent escape of those whose indictment may be contemplated, which is not pertinent here.

The second is to ensure the utmost freedom to the grand jury in its deliberations and to prevent persons subject to indictment or their friends from importuning grand jurors. Of course the grand jury has long since been discharged and that isn't of pertinence anymore.

The third is to prevent subornation of perjury or tampering with a witness who may testify before the grand jury and who may later appear for trial. That isn't of any relevance anymore.

The fourth is to encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes. That is pertinent.

The fifth is to protect an innocent accused who is exonerated of the fact that he is under investigation and the expense of standing trial. That isn't of pertinence anymore.

So the fourth is the only one that has pertinence, but the defendants in this case have all the information. As I understand it from the government, representatives of Douglas and Phillips did examine the transcripts of the testimony of their fellow employees or their employees, and it is only the testimony of those people that is sought in the first request, as I understand it. The petitioners seek the information with respect to the transcripts that

were made available to Douglas and Phillips, and also they seek the documents that were submitted by Douglas and Phillips. So, if Douglas and Phillips have the information, then the need to withdraw it for the fourth purpose seems to me to disappear.

And when you get right down to it, this is a civil antitrust action. I don't know what those people said. I don't know whether their testimony would help Douglas or help the plaintiffs, but in matters of discovery it is best that both sides have the information available. That is what discovery is for. Douglas and Phillips have that information; I can't see any valid reason why the petitioners should not have it also.

All right, that is where the laboring oar lies, gentlemen. Do you want to pull it?

MR. THURSTON: Your Honor, perhaps two points. The first one goes perhaps more to the substance of the last comment that you made. There is a very recent case very recently reported — in fact reported after we had filed our brief — entitled the State of Texas v. United States Steel Corp., 546 F.2d 627. It is a Fifth Circuit case. In that case it was pointed out that a corporation obtaining grand jury transcripts of its own employees did not destroy the supposed grand jury secrecy. I think the rationale behind that case is that employees are not reluctant to have their own employers see what it is that they have testified to. The grand jury secrecy can be maintained within the company, within the family, so to speak. When the secrecy goes further, it is a different matter.

But with that sort of a sideline comment, I suppose, the main thrust of my comments would be that while we do not dispute that your Honor has jurisdiction over the petition here, we question whether that jurisdiction needs to be exercised at the present time or whether the question

is really ripe. These petitioners have a civil case going in the State of Arizona. They have asked for discovery of these materials in that Arizona case. The defendants have, as you pointed out, all of the grand jury transcripts and all of the documents in their possession. It seems to me that the Arizona court does have both jurisdiction and probably a better feel for whether or not the traditional discovery methods are appropriate here and whether or not these materials should be discovered through those methods.

THE COURT: Who is the judge in Arizona?

MR. THURSTON: Judge Walsh and Judge Frey.

THE COURT: I have no desire to poach on Judge Walsh or Judge Frey's territory, but if they read the law the same way I do, why, they might be hesitant to allow petitioners to have access to the grand jury transcripts even though in the possession of the defendants, who presumably would say, "Well, we only got this by special dispensation but we are not at liberty to divulge it."

I would be very glad through an overabundance of precaution, if you think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection, but it doesn't seem to me that I should relegate these people to make their application to those judges when they have taken what I think is a proper step in coming here.

Anyway, how would Judge Walsh or Judge Frey have any objection to the avoidance of a discovery scrap before them? If on some other proper basis the petitioners can get the information, why would they care?

MR. THURSTON: Your Honor, I think the question here is whether or not the materials sought by these plaintiffs are relevant to the lawsuit that they have brought. Judges Walsh and Frey ought to be able to

make that decision. It would seem to me, having made that decision, if there was yet a question as to whether the transcripts could be turned over, at that time perhaps it is ripe and appropriate for this Court to make that decision; but the initial relevancy decision, it would seem to me, would go both to the propriety of the initial discovery and to the question of particularized need. If those judges determine they are not relevant, it seems to me that the particularized need is very difficult to show here.

THE COURT: The petitioners seem to think it is relevant. Apparently it involves an allegation of antitrust violation by Douglas and Phillips, and apparently that is what the grand jury proceeding involved. Apparently employees of Douglas and Phillips testified. They may be the same employees that will be expected to testify again. I don't know. But suppose it isn't relevant? If there is no harm in going through the list of reasons of the sanctity of the grand jury proceedings, if there is no harm in its being divulged, why are we worried particularly about whether or not it is relevant?

MR. THURSTON: Your Honor, I think that one of the reasons for grand jury secrecy, and it is perhaps embodied in the ones that you mentioned, is that these proceedings are not just to be spread over to the public —

THE COURT: That is right.

MR. THURSTON: — to look at possible violations that have no particular relevance to anything. It is possible that there were — not possible. It is the fact that those grand jury proceedings concerned a number of different levels of sale, both at the wholesale and retail levels, whereas the proceedings in Arizona may not involve such a broad territory. It just seems, if the relevancy is first established in Arizona, then we've got a good reason to come here to this court, but if that —

THE COURT: I am not going to deny the motion. If through any stretch of imagination I could conclude that Judge Walsh or Judge Frey would be disposed to say, "Oh, I would rather you keep your hands off and let us decide whether it is proper for them to give this information or not," I would be very glad to make that inquiry. But I have grave doubt that they would express any such concern.

As far as relevance, I would think that there is a prima facie relevance because of the nature of the grand jury inquiry with relation to the proceedings here concerned.

MR. THURSTON: It is true, your Honor, that the grand jury inquired as to antitrust violations, but, of course, there is a very wide range of possibilities there.

THE COURT: Yes. Would you educate the Court as to why you think this information may be relevant, gentlemen. Anybody from your side.

MR. BERMAN: Your Honor, the complaint and indictment contain absolutely identical and parallel allegations with regard to prices on the sale of gasoline through and to independent marketers.

THE COURT: You filed your complaint on the basis that there was a nolo contendere plea on the prosecution here?

MR. BERMAN: We filed our complaint first before the indictment, your Honor, but the indictments — and I have the paragraph citations — are absolutely parallel to the charging paragraphs of the indictment, and that I think establishes the relevancy.

THE COURT: If it was relevant to the grand jury inquiry, it would ipso facto be relevant to your case as far as you are concerned?

MR. BERMAN: That is correct, your Honor.

THE COURT: All right.

MR. BLISS: Your Honor, if I may speak to the relevancy question. Harold Bliss. The plaintiffs' complaints were filed well over a year before the grand jury indictment.

THE COURT: A year before?

MR. BLISS: Yes, your Honor. The Gas-A-Tron case involves only retail sales in Arizona. The plaintiffs in Arizona are engaged in the retail gasoline business, principally in Tucson, Arizona. None of the — well, the only supplier that the plaintiff had was Eugene Lewis, Lewis Arizona Oil Co., and Mr. Lewis' supplier was Shell Oil Company. Now, Shell Oil Company was not indicted and Shell Oil was not named as an unindicted co-conspirator, nor was Lewis Oil Co. So, if Phillips and Douglas had conspired to fix the wholesale price, it wouldn't have any effect on the plaintiffs because they didn't receive their supply from either the indicted companies or the alleged co-conspirators.

In the Petrol Stops complaint, there are thirty-one different types of Sherman Act violations alleged. Since that suit was filed the deposition has been taken by the defendants of Mr. Robert Borgert, who is one of the partners and the chief operating officer of Petrol Stops, and through that deposition we have been able to narrow down the scope of that lawsuit. Essentially what he is talking about, and I have cited the pages in my brief and I have attached copies of the deposition pages, he is talking about attempts to control his business at the retail level to get him to engage in retail price fixing. He says this was done by solicitations to have them join; by comments made by one or more of his suppliers that he has to get his prices in line or he is going to lose supply; and by predatory pricing by the defendants in that they would bring in subsidy, drive the price down

below his buying price and attempt to put him out of business. Not once in there did he say that he is complaining about wholesale price fixing. We have fourteen pages in over 2200 pages of testimony, and nowhere in there does he make the complaint that he is talking about a wholesale price fixing case. He is talking about activities at the retail level.

For that reason we are saying that the grand jury indictment, the transcripts and the documents are not relevant to his lawsuit and that this determination should be made by the Arizona court initially. For one reason, there are other defendants and there has been subsequent request to produce documents going to these type of documents and transcripts that are addressed in the Arizona cases that presumably will be decided by Judge Frey or Judge Walsh in the Rule 37 proceeding, which is the way I think this should be handled now rather than over here.

THE COURT: All right, thank you.

MR. BLISS: That is all I have to say about relevance at the moment.

THE COURT: All right. I am not going to make any orders upon the defendants. I am not going, in effect, to issue upon the defendants a demand to produce. If the plaintiff wants to get the defendants to produce anything, that can be done through that litigation. But the petitioners have asked for access to certain grand jury records, and that request will be granted with respect to the first request. That is the one where you asked for access to the same information that was accorded the defendants and the documents that they produced.

Have I correctly articulated your request?

MR. BERMAN: That is correct, your Honor.

THE COURT: And the Government so understands it?

MR. HERNACKI: Yes, your Honor.

THE COURT: All right, that access will be made.

What is your name, sir?

MR. HERNACKI: Hernacki.

THE COURT: Mr. Hernacki, you said the best way to do it would be to have the defendants make the papers that they got from the grand jury available. I am not going to do it that way. You make arrangements with the petitioners to have access to that information. If Phillips and Douglas want to cooperate in the mechanics of reproduction that is all right, but my order is simply that the grand jury records will be opened up to that limited extent. Do you understand, sir?

MR. HERNACKI: In other words, your Honor, we are to make the documents available; however, if Phillips and Douglas wish themselves to produce a set of documents —

THE COURT: That is up to them.

MR. HERNACKI: — that is up to them.

THE COURT: That is a matter among you.

MR. HERNACKI: Yes.

THE COURT: My order is simply that the custodians of the grand jury records will make them available to that extent to the petitioners. That is with respect to the first request.

With respect to your second request, I am about to deny it. In the first place, as I think Phillips and the Government said, there are no points and authorities and there is no need shown with respect to them. Also, some of this information that was before the grand jury may have come from or be relevant to competitors or something of that kind. I don't think there is any show-

ing that would justify your having any more than you asked for in the first request.

MR. PERRY: Excuse me, your Honor. The second request was not to be before the Court today. We made an agreement a month or so ago that we would not involve in this hearing any of the parties other than Phillips, Douglas and Continental.

THE COURT: I see.

MR. PARRY: That one was filed improperly. Hearing date would have to be set in the future after proper briefs and memorandums have been filed.

THE COURT: All right.

MR. PARRY: That was our mistake, your Honor.

THE COURT: If I am not asked to rule on that, I am not doing so. But now you understand who has the uphill battle on that one.

MR. BERMAN: Yes, your Honor.

THE COURT: Anything further, gentlemen?

MR. BLISS: Your honor, my initial comments were restricted solely to relevance. I would like to talk about the cases on the merits of disclosing the grand jury documents.

You referred to Judge Robson's decision in the Concrete Block case as far as impeachment is concerned. The plaintiffs have cited a number of other cases in which transcripts were made available to civil plaintiffs. In all of those cases, your Honor, a deposition was being taken and the deponent was evasive or couldn't remember anything.

In this case no deposition has even been noticed of any defendants. There hasn't been any opportunity for them to be shown to be vague or unresponsive or to fail to recollect what the testimony is, and there has been no

particularized showing of a compelling need. Until there is something of that nature, I believe the transcripts should remain secret, as they have been ruled in the State of Texas vs. U. S. Steel Corporation that Mr. Thurston referred to. I think that case disposes of the numerous district court cases that the petitioners have cited, saying that if the defendant has them under Rule 16 of the federal criminal rules that then there is no need for particularized showing of compelling need. I think that is the most recent authority out of the Fifth Circuit, and I think it is correct.

As far as the U. S. Industries case is concerned, that case involved a governmental pre-sentencing memorandum that had been shown to the defendants. The petitioners could not get that any other way but through the Government. Here we have the documents; we have the transcripts. We can make them available to them — that is, our copies — if the Court that has the civil antitrust case compels us to under Rule 37.

As far as the jurisdictional question, your Honor, we do not challenge the Court's jurisdiction.

THE COURT: All right.

MR. BLISS: The Herman Schwabe case dealt with the grand jury minutes and an attempt to get it in the wrong district court. That is not what we are talking about here.

THE COURT: It comes pretty close, doesn't it? The results of grand jury proceedings.

MR. BLISS: The minutes were in the possession of the court in Massachusetts, not in the District of Columbia.

THE COURT: Sure.

MR. BLISS: We are talking about our documents of which we have copies and transcripts of which we have copies.

MR. BLISS: In the Seventh Circuit case, that statement by the court was simply in the context of whether a court should interfere with an ongoing grand jury. It says it is under the control of the Court, not a —

THE COURT: I have read your authorities, Mr. Bliss. I am still of the same mind.

There is one thing, gentlemen. That information will be given to you under a protective order, however. You are not to disclose it. You are to use it only for purposes of this litigation. Is there any reason why it needs to be disclosed to anybody other than you or your lawyer colleagues?

MR. BERMAN: No, your Honor. If the order can be that it only be disclosed to counsel for the petitioners to be used solely for the purposes of the litigation and applicable proceedings in that litigation, that is fine.

THE COURT: Prepare an appropriate order and include that protective order.

MR. THURSTON: Your Honor, a suggestion of perhaps one further protection. In previous proceedings of this nature it has been stipulated that when these grand jury transcripts go out they are to go back to the Government at the conclusion of the proceedings. Can we incorporate that?

THE COURT: Yes, I think we can incorporate that, too. Any objection to that?

MR. BERMAN: None at all, your Honor.

THE COURT: All right. That will be included.

Will you prepare an appropriate order?

MR. BERMAN: We will, your Honor.

THE COURT: All right, gentlemen. Thank you.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, et al., *Petitioners,* vs. UNITED STATES OF AMERICA, *Respondent,* DOUGLAS OIL COMPANY OF CALIFORNIA, et al., *Real Parties In Interest.*	Miscellaneous No. 5706

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 19 pages are a true and correct transcript of the proceedings had in the above-entitled cause on Monday, March 28, 1977, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 13th day of March, 1977.

Ben Newlander
Official Reporter

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

DOUGLAS OIL COMPANY OF CALIFORNIA and PHILLIPS PETROLEUM COMPANY,
Intervening-Respondents.

PETITIONERS' REPLY MEMORANDUM IN RESPONSE TO PHILLIPS PETROLEUM COMPANY'S AND DOUGLAS OIL COMPANY'S OPPOSITION TO THE PETITION FOR INSPECTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA
Misc. No. 5706

Petitioners seek from this Court an Order granting them the right to inspect transcripts of grand jury testimony and documents produced pursuant to grand jury subpoena which have been impounded by Order of this Court. The respondents,* Phillips Petroleum Company and Douglas Oil Company, styling themselves "the real parties in interest", have opposed the Petition primarily on the ground that respondents believe that this Court is not competent to determine the relevancy of the grand jury material requested to the issues in the lawsuits now pending in the United States District Court for the District of Arizona, *Petrol Stops v. Continental,* Civil No. 73-212 TUC-JAW, and *Gas-A-Tron and Coinoco v. Union Oil Company,* Civil No. 73-191 TUC-WCF. (Hereinafter collectively referred to as the "private Arizona actions".) Continental Oil Company has not opposed the Petition; it correctly understands that it does not have standing. As the United States District Court for the District of Illinois explained in *Connecticut v. General Motors Corp.,* 1974-2 Trade Cas. ¶ 75,138 (N.D. Ill. 1974):

> The only person or entity empowered to assert a right to the continued secrecy of Grand Jury transcripts is the government, or more precisely the United States Attorney as an agent of government, through and by whom the Grand Jury testimony was obtained. The defendants who have obtained disclosure and copies of Grand Jury testimony in another proceeding by the showing of a particularized need, do not thereby acquire any vested interest in the documents, the testimony or the secrecy previously attached thereto. Having obtained a waiver of Grand Jury secrecy for their own purposes in another matter, they cannot presume to assert secrecy as a bar to disclosure in this case. The suggestion in the brief of Ford and General Motors that

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* Although not formally correct, for the sake of clarity, Phillips Petroleum Company and Douglas Oil Company will hereinafter be referred to as "Respondents".

the disgorging by them of Grand Jury transcripts is somehow a deprivation of or encroachment upon the constitutional rights of these two corporations, is to assume a right to the continued secrecy of the testimony of certain individuals before the Grand Jury which no longer exists, and which never in any event inured to the benefit of the corporate defendants, and therefore may not be asserted by them. (*Id.* at 97,081.)

Phillips and Douglas are not the "real parties in interest". Their only interest is in impeding discovery. They have no "right" to assert. Only the United States Attorney is empowered to assert the right, and the United States Attorney in this case has not asserted any right to secrecy. In fact, as evidenced by the letter from the United States Department of Justice, Antitrust Division, to attorneys for respondents, the Justice Department makes no objection to the Petition and will not oppose it. (See, Exhibit A attached hereto.)

Phillips and Douglas do not advance legally sufficient grounds for the continued "secrecy" of transcripts and documents which already have been shown to them but, in fact, Phillips and Douglas merely make a self-serving collateral argument that this Court somehow is not the proper forum to determine whether the transcripts and documents involved in a grand jury proceeding of this Court ought to be disclosed for the inspection of treble damage plaintiffs. Simply, Phillips and Douglas make the following collateral arguments:

1. That jurisdiction is properly in the United States District Court for the District of Arizona. (*See*, Phillips' Memorandum at 16; Douglas' Memorandum at 4-7.)

2. That this Court cannot properly determine the scope of discovery in an antitrust case. (*See*, Phillips' Memorandum at 17; Douglas' Memorandum at 4.)

3. That the petition is premature and should wait the conclusion of all other methods of discovery. (*See*, Phillips' Memorandum at 16; Douglas' Memorandum at 2.)

Phillips and Douglas then conclude that:

4. Petitioners do not meet the standard of disclosure.

I. Only The District Court Where The Grand Jury Proceedings Took Place Has Jurisdiction Over The Grand Jury Transcripts And Documents.

The facts are undisputed. Early in 1973, respondents were served with a Subpoena Duces Tecum issued by the Clerk of this Court to appear before a grand jury and produce certain documents. The respondents and numerous other rebrand wholesalers of refined petroleum products responded and produced certain documents and employees and agents to testify before a grand jury of this Court. On or about March 19, 1975, the grand jury issued its indictment against respondents in Criminal Action No. 75-377, again to this Court. On the same day the Justice Department of the United States Government filed a civil action against the same respondents, Civil No. 75-974-HP, again in the United States District Court for the Central District of California. On December 3, 1975, this Court accepted *nolo contendere* pleas from the respondents, Phillips Petroleum Company and Douglas Oil Company, and on or about February 1, 1977, the Justice Department made public a proposed consent judgment to be entered in the civil action which was pending in this Court.

In the course of the criminal proceedings, this Court impounded all of the documents and transcripts of the grand jury proceedings. However, during the course of the criminal proceeding both Phillips and Douglas were permitted to examine the transcripts of their employees, agents and other individuals and were shown documents

exhibited to the grand jury. It is these records that petitioners now seek.

All relevant acts involving the grand jury proceedings and the documents and transcripts sought are within the jurisdiction of this Court. And, in fact, these documents and transcripts are subject only to an Order of this Court. The United States District Court for the District of Arizona obviously does not have jurisdiction over the documents being held by the Antitrust Division of the Justice Department in Los Angeles, and it is without power to order a sister district court to disclose grand jury documents.

But, more importantly, case law is clear, only the district court impaneling the grand jury has jurisdiction over the transcripts of its proceedings and over the documents subpoenaed by the grand jury. *Herman Schwabe Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C. 1956). This same issue was discussed at length by the United States Court of Appeals for the Seventh Circuit in *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1957).* As that court concluded:

> We are aware that it has been held that, if, after an indictment has been founded and made public and the defendant has been apprehended, Metzler v. United States, 9 Cir., 64 F.2d 203, 206, and the grand jury discharged, Atwell v. United States, 4 Cir., 162 F. 97,

* In the report of this case it is indicated that certiorari was granted on February 25, 1957, and indeed the Supreme Court's order of that date, 77 S.Ct. 552, 352 U.S. 997, 1 L.Ed.2d 544, does purport to grant certiorari in that case. Study of the petition for certiorari and other original documents discloses, however, that it is not the order of Nov. 13, 1956, reported at 239 F.2d 263, which was involved in the petition for certiorari, but rather a criminal proceeding involving the same parties, decided by the Seventh Circuit June 15, 1955, and reported at 225 F.2d 394. Ultimately the Supreme Court vacated the June 15, 1955, judgment, 78 S.Ct. 245, 355 U.S. 233, 2 L.Ed.2d 234, but this did not affect the order of Nov. 13, 1956. (*Wright & Miller*, Criminal § 109, at 1965, fn. 76.)

> 101, a disclosure becomes essential to the attainment of justice and the vindication of the truth, the rule of secrecy may be relaxed in the discretion of the court. *This responsibility should reside in the court, of which the grand jury is a part and under the general instructions of which, it conducts its "judicial inquiry".* Schmidt v. United States, 6 Cir., 115 F.2d 394, 397. (Emphasis supplied.) (*In re April 1956 Term Grand Jury, supra* at 272.)

Jurisdiction over the grand jury transcripts and documents sought by petitioners in this action alone is in this Court. The United States District Court for the District of Arizona could not properly order disclosure of transcripts of the proceedings of a grand jury impaneled by this Court and of documents impounded by Order of this Court.

II. Discovery Envisioned By The Federal Rules Of Civil Procedure Is Limited Only By The Issues Of The Pleadings And Not By The Limitation Of The Testimony Given At A Single Deposition.

Respondents seek to limit petitioners' access to respondents' own documents and the testimony of their own employees by arguing for continued secrecy of the material developed by the now disbanded grand jury. Respondents cannot, in good faith, argue that the information sought by petitioners is not relevant to the issues in the pending private Arizona actions.

Rule 26(b) of the Federal Rules of Civil Procedure requires only that the information sought by discovery be "relevant to the subject matter involved in the pending action." As *Wright & Miller* states, "[T]his is an explicit recognition that the question of relevancy is to be more loosely construed at the discovery stage than at the trial." (*Wright & Miller*, Civil § 2008, at 41.) The United States Supreme Court in the leading case of

Hickman v. Taylor, 239 U.S. 495 (1947), explained that "the deposition — discovery rules are to be accorded a broad and liberal treatment", and as Justice Jackson reiterated in his concurring opinion, "it seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in this case." (*Id.* at 516.)

The limitations of Rule 26 to material relevant to the subject matters involved in the pending action is not restricted to precise issues presented by the pleadings. *T.W.A. v. Hughes,* 29 F.R.D. 523 (S.D.N.Y. 1961); *Hercules Powder Co. v. Rohm & Hess Co.,* 3 F.R.D. 302 (D. Del. 1943); *Burrows v. Warner Bros. Pict. Inc.,* 12 F.R.D. 491 (D. Mass. 1952); *Stephen Theatre Corp. v. Lovell's,* 17 F.R.D. 494 (E.D.N.Y. 1955). In *Stevenson v. Melady,* 1 F.R.D. 329 (D.C.N.Y. 1940), Judge Leibell stated,

> To limit an examination to matters relevant to only the precise issues presented by the pleadings would not only be contrary to the express purpose of Rule 26 . . ., but also might result in a complete failure to afford plaintiff an adequate opportunity to obtain information that would be useful at trial. (*Id.* at 330.)

The United States Supreme Court recognized this same principle in *Hickman v. Taylor, supra,* when it explained that the purpose of the discovery rules are to determine and define the issues to be tried. (Supra at 500-01.)

Phillips in its memorandum argues that the scope of discovery under Rule 26(b) is not even as broad as the issues in the Complaint, but must be limited by depositional testimony.

The offenses for which respondents were indicted and to which they plead *nolo contendere,* are precisely the same antitrust violations, among others, described in petitioners' Complaints in the private Arizona actions. Paragraph 16 N of the Complaint in *Petrol Stops v.*

Continental claims that the respondents, Phillips and Douglas, together with other named defendants and their co-conspirators,

> . . . combined and conspired to fix, raise and maintain the price of gasoline charged to independent marketers of gasoline, including the plaintiff.

Paragraph 15 L of the Complaint in *Gas-A-Tron v. Union* alleges the same violative conduct by the respondent, Phillips, and others in Tucson, Arizona. This same violative conduct by these same defendants in the same geographic area, during the same time period was the subject of the Indictment of the grand jury against Phillips and Douglas and their co-conspirators.

It is clear from the "Definitions" section, paragraph 1 of the Indictment that rebrand gasoline as used in the Indictment is identical to the gasoline sold petitioners and other independent marketers alleged in paragraphs 16 N and 15 L of the private Arizona actions. "Rebrand gasoline" as used in the Indictment is gasoline sold to independent unbranded marketers. Petrol Stops, Gas-A-Tron and Coinoco are the marketers of the "rebrand gasoline" whose purchase price the Indictment claimed had been fixed in violation of Section 1 of the Sherman Act by Douglas, Phillips and others. As the Indictment explains in paragraph 12, Phillips, Douglas and their co-conspirators had combined and conspired to "increase, fix, stabilize and maintain the price of rebrand gasoline."

The language of the Indictment in a criminal context and of the Complaints in a civil context are almost identical. The testimony and documents upon which the Indictment was based are clearly within the scope of discovery of the private Arizona actions.

III. Petitioners' Petition To This Court For Disclosure Of Grand Jury Transcripts And The Federal Rules of Civil Procedure Do Not Prohibit A Party From Seeking Discovery By One Method As Opposed To A Method Suggested By The Opposing Party.

Proper discovery compels petitioners to seek disclosure of the grand jury transcripts. Respondent, Phillips, in its memorandum suggests that "it is premature to consider the instant petition" because the grand jury transcripts and grand jury documents can be obtained by the petitioners in the private Arizona actions. (Phillips' Memorandum at 16.) This is precisely what the plaintiffs in the private Arizona actions are seeking in their Petition to this Court.

Douglas similarly argues that petitioners have not exhaustively sought the documents in the private Arizona actions. Petrol Stops propounded a Request for Documents under Rule 34, Douglas objected to the request and did not produce the grand jury materials. Douglas argues that petitioners should have filed a motion to compel pursuant to Rule 37 after complying with local rules requiring counsel to meet to attempt to resolve differences. Counsel for petitioners has met with counsel for five of the defendants and has meetings scheduled this week with counsel for Douglas and Continental. Petitioners seek the grand jury documents and grand jury transcripts which respondents have to date refused to produce in the private Arizona actions. As Judge McGarr explained in *Connecticut v. General Motors Corp.*, 1974-2 Trade Cas. ¶ 75,138 (N.D. Ill. 1974).

> . . . this matter should be considered in the context of traditional discovery principles. The Grand Jury transcripts involved are being regarded by this Court as statements of potential witnesses in the hands of the defendants. The fact that they were taken under oath before a Grand Jury is no longer relevant to the consideration of this motion, once the concept of the Grand Jury secrecy has been removed from consideration by delivery and disclosure to the defendants, albeit in another lawsuit and for other purposes. (*Id.* at 97,080-81.)

In *U.S. v. Saks & Co.*, 1976-1 Trade Cas. ¶ 60,741 (S.D.N.Y. 1976), Judge Worker discussed the importance of making grand jury developed information available to plaintiffs rather than requiring a repetitious pursuit of the information through civil discovery methods. He explained:

> In my opinion, in the interests of justice and judicial as well as administrative economy, the disclosure of documentary evidence by this method [motion for examination and copying of documents and statements voluntarily or involuntarily produced for the Department of Justice] is superior to proceeding by way of the Federal Rules. I further believe that the time of discovery will be shortened by this method. (*Id.* at 68,182.)

IV. Petitioners Are Entitled to Inspect The Grand Jury Transcripts And No "Particularized Need" Need Be Shown.

The continued secrecy of grand jury transcripts and documents is not absolute. As the United States Supreme Court recognized in *U.S. v. Socony Vacuum Oil Co.*, 310 U.S. 150, 233 (1940), "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." (*Id.* at 233.) As Justice Brennan noted in his dissent in *Pittsburg Plate Glass Co. v. U.S.*, 360 U.S. 395, 403 (1959):

> Grand Jury secrecy is, of course, not an end in itself. Grand Jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or

when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice. (*Id.* at 403.)

Courts, in similar cases, consistently have ordered the disclosure of grand jury transcripts and documents to third-party treble damage plaintiffs. In *In re Sugar Antitrust Litigation*, 1976-1 Trade Cas. ¶ 60,934 (N.D. Cal. 1976), the United States District Court for the Northern District of California explained:

> Because the defendant C and H had the opportunity to inspect and analyze the transcripts during the course of the prior government proceeding, the policy reasons supporting the rule of grand jury secrecy have been vitiated by the prior disclosure. These grand jury transcripts are relevant to the pending treble damage actions and no further showing of particularized need is required to permit disclosure of these transcripts to plaintiffs. *It would be inequitable and adverse to the principles of federal discovery to prevent plaintiffs from having equal access to these transcripts.* (Emphasis supplied.) (*Id.* at 69,080.)

The facts in *In re Sugar* were almost identical to the facts before this Court. During the course of the criminal proceedings arising from the indictment of C and H Sugar, the Antitrust Division was ordered to produce to the defendant, C and H, the transcripts of the testimony of its present and former officers and employees who testified before the grand jury. These criminal proceedings were terminated against all defendants by pleas of *nolo contendere*. The request for disclosure followed the complete termination of the criminal proceedings — the grand jury had completed its investigation, returned its indictments and had been dismissed.

Similarly, the United States District Court for the District of Arizona in *In re Arizona Dairy Products Litigation*, 1976-1 Trade Cas. ¶ 60,910 (D. Ariz. 1975), as affirmed by the Ninth Circuit; and the United States District Court for the Eastern District of Michigan in *In re Toilet Seat Antitrust Litigation*, 1975-2 Trade Cas. ¶ 60,557 (E.D. Mich. 1975); and the United States District Court for the District of Idaho in *Boise City, Idaho v. Monroe, Inc.*, 1976-2 Trade Cas. ¶ 61,178 (D. Idaho 1976); and the United States District Court for the Northern District of Illinois in *In re Cement-Concrete Block, Chicago Area*, 381 F. Supp. 1108 (N.D. Ill. 1974), all have reached the identical conclusion on facts essentially identical with the facts in this case and in *In re Sugar, supra*, as set forth above.

A. *The transcripts and documents, the subject of the present Petition, have been disclosed to respondents and the need to further maintain secrecy is not present.* Maintaining the secrecy of grand jury transcripts and documents cannot be treated in a vacuum. It can only be considered in light of the need to maintain the "secrecy" and in the need for disclosure. *U.S. Industries Inc. v. United States District Court for the Southern District of California*, 345 F.2d 18 (9th Cir. 1965), *cert. denied*, 382 U.S. 814 (1965).

> . . . in making a determination of when to permit a disclosure of grand jury proceedings, we are to examine, not only the need of the party seeking disclosure, but also the policy consideration for grand jury secrecy as they apply to the request for disclosure there under consideration. In other words, if the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need. (*Id.* at 21.)

It is clear in this case that there is no need to maintain secrecy.

Policy considerations supporting "continuation" of the grand jury secrecy in a particular case as set down in *U.S. v. Amazon Industrial Chemical Corp.*, 55 F.2d 254, 261 (D. Md. 1931), have been universally adhered to. *See, e.g., U.S. v. Procter & Gamble*, 356 U.S. 677, 681, n. 6, (1958); *U.S. Industries Inc. v. United States District Court for the Southern District of California, Central Division*, 345 F.2d 18 (9th Cir. 1965); *U.S. v. Rose*, 215 F.2d 617, 628-29 (3rd Cir. 1954); *In re Cement-Concrete Block, Chicago Area*, 381 F. Supp. 1108, 1110 (N.D. Ill. 1974). These reasons are:

(1) To prevent the escape of those whose indictment may be contemplated;

(2) To insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;

(3) To prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;

(4) To encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes;

(5) To protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

See, U.S. Industries Inc. v. United States District Court for the Southern District of California, Central Division, 345 F.2d 18 (9th Cir. 1965).

In applying these policy considerations for maintaining secrecy to the facts of the present case, it is apparent the first three reasons are not applicable. All testimony before the grand jury has been concluded, and all indictments have been handed down and there can be no fear that any proceeding before the grand jury will be frustrated or that the guilty party escape the jurisdiction of the court. The grand jury has completed its investigation, returned its indictments and the criminal proceedings have been terminated by the return and acceptance of *nolo contendere* pleas of all of the defendants. Under these facts, "the rule of secrecy may be relaxed in the discretion of the court." (*See, In re the April 1956 Term Grand Jury*, 239 F.2d 263, (7th Cir. 1956).) *See also, In re Cement-Concrete Block, Chicago Area*, 381 F. Supp. 1108 (N.D. Ill. 1974); *U.S. v. Scott Paper Company*, 245 F. Supp. 759 (W.D. Mich. 1966); *Boise City, Idaho v. Monroc, Inc.*, 1976-2 Trade Cas. ¶ 61,178 (D. Idaho 1976).

The fifth policy reason also is no longer relevant because indictments were returned against all of the respondents. (*See, e.g., U.S. Industries v. United States District Court for the Southern District of California, Central Division*, 345 F.2d 18 (9th Cir. 1965).)

This leaves the fourth consideration as the only possible basis for maintaining traditional grand jury secrecy — that of insuring untrammeled disclosure by future grand jury witnesses. This factor, however, has been vitiated because the respondents have previously inspected the grand jury transcripts and documents during the course of the prior criminal proceedings. Those whom the grand jury witnesses most had to fear, their employers, have already inspected their testimony. Any danger of recrimination would have been affected by the initial disclosure and could not be increased by subsequent disclosure of the same material. (*In re Cement-Concrete Block, Chicago Area*, 381 F. Supp. at 1108

(N.D. Ill. 1974).) Disclosure to petitioners in this action would not inhibit free and untrammeled disclosure, as the witnesses have nothing to fear from private treble damage plaintiffs whose only interest also is "to encourage free and untrammeled disclosure by persons who have information with respect to the commission of" violations of the antitrust laws. *See, U.S. Industries Inc. v. United States District Court for the Southern District of California*, 345 F.2d 18, 22 (9th Cir. 1965).

Controlling is the case of *U.S. Industries Inc. v. United States District Court for the Southern District of California*, 345 F.2d 18 (9th Cir. 1965), a case arising out of a petition by U.S. Industries to have the United States District Court for the Southern District of California order disclosure of government memoranda which contained testimony from witnesses which appeared before the grand jury and documents produced pursuant to grand jury subpoena for the use of U.S. Industries in a pending civil antitrust action. The facts in *U.S. Industries* are strikingly similar to the facts of the present petition. Prior to the filing of the petition for disclosure, the grand jury proceeding had been terminated, indictments had been entered and pleas of *nolo contendere* were permitted by the court over objection of the government.

On appeal the Ninth Circuit Court of Appeals held that disclosure was proper. The court noted that, "the secrecy that surrounds the grand jury is not absolute in nature." (*Id.* at 21.) The court noted that Rule 6(e) of the Federal Rules of Criminal Procedure provides that disclosure of matters occurring before the grand jury may be disclosed upon order of the court. The Circuit Court found that where the party opposing disclosure had already reviewed the material sought and the grand jury had completed its proceedings, the policy reasons for the maintenance of secrecy no longer existed. (*Ibid.*) In fact, the court found

that the policy reasons for maintaining the secrecy of the grand jury were overcome by the requirements of "liberal discovery procedure" in antitrust cases. *U.S. Industries, supra* at 23. *See also, Olympic Refinery Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964), *cert. denied*, 379 U.S. 900 (1964).

The reasons for maintaining whatever secrecy there remains in the grand jury transcripts and documents no longer exist. Respondents Phillips and Douglas have destroyed that secrecy. The ends of justice now require that the plaintiffs in a civil antitrust action have access to the same material available to the defendants. No further particularized need is required. The ends of justice require that adverse parties have equal access to these transcripts.

B. *Even though the ends of justice require disclosure, petitioners have shown a "particularized need".* Respondents, Phillips and Douglas, in their briefs argue that no particularized need for disclosure has been shown which will overcome the policy reasons for secrecy. The cases consistently hold:

> The defendants in the criminal action have had the opportunity to inspect and analyze the transcripts, and therefore the policy reasons supporting the rule of grand jury secrecy have been vitiated by that prior disclosure. No further showing of particularized need is required to permit disclosure of the transcript to plaintiffs. It would be inequitable and adverse to the principles of federal discovery to prevent plaintiffs from having equal access to the transcripts. (*In re Toilet Seat Antitrust Litigation*, 1975-2 Trade Cas. ¶ 60,557, at 67,445 (E.D. Mich. 1975).)

See also, U.S. Industries Inc. v. United States District Court for the Southern District of California, 345 F.2d 18 (9th Cir. 1965); *In re Sugar Antitrust Litigation*, 1976-1 Trade Cas. ¶ 60,934 (N.D. Cal. 1976); and *In re*

Arizona Dairy Products Litigation, 1976-1 Trade Cas. ¶ 60,910 (D. Ariz. 1975).

On the facts of this case, even assuming that the respondent Phillips has a right to assert in view of the governments' decision that the maintenance of this secrecy is not necessary, and in light of the prior disclosure of this material to the very individuals opposing full and fair disclosure to the plaintiffs, particularized need has been shown and is legally sufficient. However, further sufficient need can be shown.

Petitioners have been involved in this complex protracted litigation for almost four years.* The recollection of some of the witnesses may be fading with time. The grand jury investigation occurred in June 1973. As the court said in *Sellers v. Allis-Chalmers Mfg. Co.*, 1963 Trade Cas. ¶ 70,730 (N.D. Ill. 1962):

> The need of the moving parties for access to the Grand Jury testimony for purposes of refreshing the witness's [sic] recollection or exposing inaccuracies in his deposition testimony is therefore as great now as it might be at trial. (*Id.* at 77,895.)

See also, Herman Schwabe v. United Shoe Machinery Corp., 194 F. Supp. 763 (D.C. Minn. 1958). The court in *In re Special 1952 Grand Jury*, 22 F.R.D. 102 (E.D. Pa. 1958), noted that it recognized that the witness' recollection will become even dimmer by the time of trial is itself an important reason for allowing disclosure at this stage of the proceedings.

The Ninth Circuit Court explained in *U.S. Industries* that under similar circumstances a "particularized need" sufficient to overcome any policy reason for maintaining the disclosure of grand jury evidence in that case was made by showing that disclosure would aid discovery.

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* Discovery was stayed for over two years while Shell and Exxon unsuccessfully tried to disqualify plaintiffs' counsel.

(*Supra* at 23.) Consistent with the Ninth Circuit the Northern District of California found that the particularized need had been satisfied in *In re Sugar Antitrust Litigation, supra*, where the grand jury transcripts are relevant to the pending treble damage actions. (1976-1 Trade Cas. at 69,080.)

But, in this case there is even a further need. Rule 26(e) of the Federal Rules of Civil Procedure explains that a party responding to discovery is under a duty seasonably to amend a prior response as he obtains information upon the basis of which he knows that the response was correct or is no longer true. In responding to plaintiffs' first sets of interrogatories in the private Arizona actions, both Phillips and Douglas stated that they were not aware or had not engaged in any of the conduct which was the basis for the grand jury Indictment and which was the basis for their *nolo contendere* pleas in criminal actions. Petitions asked the following interrogatories:

> *Interrogatory No. 82.* State whether your company had any conversation or communication with any major oil company other than your company with regard to rack or spot prices on the sale of gasoline in the United States and, if your answer is in the affirmative, identify all documents of the company during the discovery period disclosing or relating to any such conversation or communication and specify each such conversation or communication.

In response, Douglas Oil Company replied:

> Douglas Oil Company is not aware of any such conversations or communications except discussions in the normal course of trade with its commercial customer, Armour Oil Company, as regarded the spot prices charged to it by Defendant.

Interrogatory No. 77. State whether your company had any conversation or communication with any major oil company other than your company relating to gasoline prices or gasoline market conditions in any of the areas listed in interrogatory number 40, or in the West Coast states and, if your answer is in the affirmative, identify all documents of the company during the discovery period disclosing or relating to any such conversation or communication and specify each such conversation or communication.

In response, Douglas Oil Company replied:

Douglas Oil Company is not aware of any communications or conversations since early 1969 with any major oil company relating to gasoline prices or gasoline market conditions in the West Coast states, including any areas which may possibly be contemplated in Interrogatory No. 40.

Defendant has, of course, held discussions with Armour Oil Company, on many occasions, regarding Armour Oil Company's buying price. These discussions were nothing more than normal supplier-customer communications.

Prior to the decision in *U.S. v. Container Corporation*, 89 S. Ct. 510, in January, 1969, inquiries may have been made from time to time of competitors to verify the report of field personnel as to a change of price by the competitor. There would, however, be no documents at this date disclosing any such communication.

Phillips response was a bit more circuitous. Phillips objected to the interrogatories on the following grounds:

Interrogatories 77 and 82 seek information concerning any conversations or communications with any major oil companies relating to gasoline prices or gasoline market conditions in a specified geographical

area. Phillips employees may have had conversations with other defendants, in accordance with the practice upheld by the courts in several decisions such as *Bellis-ton v. Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), *cert. den.* 408 U.S. 928; *Wall Products Co. v. National Gypsum Co.*, 326 F. Supp. 205 (N.D. Cal. 1971); *Webster v. Sinclair Refining Company*, 338 F. Supp. 248 (D. Ala. 1971), to verify whether Phillips was justified under the law in lowering its price to its jobbers and dealers to meet competitive situation. It would be virtually impossible for Phillips to identify and verify the existence of any such conversations as requested in these interrogatories. Moreover, Phillips objects to these interrogatories to the extent they inquire about any such legal conversations were held, and documents related thereto, on the ground that such conversations, if any, are irrelevant and immaterial to plaintiff's claims and not reasonably calculated to lead to the discovery of admissible evidence. Since October 1969 it has been Phillips' policy to refrain from any conversations or communications with any and all of its competitors relating in any way to prices except in situations where Phillips is selling to or buying from a competitor and the price of the product being bought and sold obviously must be discussed.

Except for the two limited exceptions noted above, Phillips is not aware of any conversations or communications with any other defendant to this action with regard to gasoline prices.

The grand jury found that both Douglas and Phillips had been involved in these price fixing conversations and indicted them for just such a price fixing conspiracy. There was at least sufficient evidence before the grand jury to convince Douglas and Phillips to plead *nolo contendere* in a criminal action to conduct which was the subject of Interrogatory Nos. 82 and 77.

Either respondents did not have accurate information at the time of answering petitioners' interrogatories or they were hopeful that the information developed by the grand jury investigation would lead to the indictment and *nolo contendere* pleas would not become public. Whichever their motive, petitioners are entitled to present the facts surrounding the violations to the court in Arizona. Respondents were under a duty to supplement their answers:

> For a party to sit idly by, knowing that a previous answer he has given in response to discovery is no longer truthful in the light of his present information, is intolerable. It is inconsistent with the purpose of rules to avoid surprise and it is inconsistent with the standards of conduct that one expects in a learned and honorable profession. (*Wright & Miller,* Civil § 2048, at 320-21.)

If on the other hand Phillips and Douglas do not believe that their answers to interrogatories need supplementing, then petitioners certainly have a "need" for the material to impeach. The United States Supreme Court has found that such a need compels disclosure.

> We do not reach in this case problems concerning the use of the grand jury transcripts at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discretely and limitedly. (*U.S. v. Proctor & Gamble*, 356 U.S. 677 (1958).)

Petitioners need the grand jury transcripts, notes and exhibits to determine the truth concerning the conversations regarding the price at which gasoline would be sold to respondents.

CONCLUSION

The petition to inspect and copy transcripts, notes and documents previously reviewed and inspected by Phillips Petroleum Company and Douglas Oil Company of California should be granted. It would be unjust and inequitable to allow a party to a civil antitrust action to view documents relevant to that action and to preclude an opposing party that same right. Petitioners merely seek to inspect and review all transcripts, notes and exhibits reviewed or produced by the defendants, Douglas Oil Company of California and Phillips Petroleum Company. Phillips, by claiming that it is a "Real Party in Interest" has attempted to argue that secrecy to documents exists which have already been disclosed to it and to Douglas. Douglas has argued that petitioners must pursue disclosure in a court that does not have jurisdiction over the grand jury material.

Phillips and Douglas, although pleading *nolo contendere* to criminal charges, answered interrogatories in the civil action claiming that the conduct supportive of the Indictment and *nolo contendere* pleas did not take place. Plaintiffs have a right to verify and impeach on the basis of the evidence known to Douglas and Phillips and exhibited to the grand jury.

DATED this 2nd day of March, 1977.

Respectfully submitted,

Douglas J. Parry
Gary F. Bendinger
BERMAN & GIAUQUE
500 Kearns Building
Salt Lake City, Utah 84101

UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

Los Angeles Office
1444 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
213-688-2500

Please refer to:
60-57-220

December 15, 1976

John Dickey, Esquire
Sullivan & Cromwell
48 Wall Street
New York, New York 10005

Max L. Gillam, Esquire
Latham & Watkins
555 South Flower Street
Los Angeles, California 90071

Re: *United States v. Phillips Petroleum, Inc., et al.*

Dear Messrs. Dickey and Gillam:

Enclosed please find a Petition for Production for Inspection of Transcripts of Grand Jury Testimony and Documents Pursuant to Grand Jury Subpoena, served on us December 15, 1976. You will note that the petitioners, plaintiffs in treble damage actions in Arizona, have requested an order to produce the grand jury documents and transcripts made available to Phillips and Douglas. The Antitrust Division will make no objection to this Petition; however, we wish to notify you of the Petition so that you may voice any objections you may have to the Court. We

Exhibit "A"

will notify you as soon as a date for hearing this Petition has been set.

If you have any questions, please feel free to contact me.

Sincerely yours,

(SIG)

Edwin D. Hausmann
Attorney
Los Angeles, Office

Enclosure

cc: Bruce R. Merrill
Lewis J. Ottaviani
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Attorneys for Real Party In
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of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, ET AL., *Petitioners,* vs. UNITED STATES OF AMERICA, *Respondent,* DOUGLAS OIL COMPANY OF CALIFORNIA and PHILLIPS PETROLEUM COMPANY, *Real Parties In Interest.*	Misc. No. 5706 RESPONSE OF DOUGLAS OIL COMPANY OF CALIFORNIA TO PETITION FOR PRODUCTION FOR INSPECTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA

Real party in interest Douglas Oil Company of California ("Douglas") hereby responds to the petition of Petrol Stops Northwest, et al. ("Petrol Stops") for Production for Inspection of Transcripts of Grand Jury Testimony and Documents Produced Pursuant to Grand Jury Subpoena.

I. PETROL STOPS' PETITION IS PREMATURE BECAUSE IT HAS NOT PURSUED ITS PREVIOUS REQUEST FOR THE SAME DOCUMENTS.

Petrol Stops already has sought to obtain copies of the very documents which are the subject of this petition. On or about October 5, 1976, in the case of *Petrol Stops Northwest vs. Continental Oil Co., et al.,* District of Arizona, No. Civ. 73-212 Tuc-JAW*, Petrol Stops propounded a Request for Production of Documents under Rule 34 from the defendants therein, Douglas, Continental Oil Company and Phillips Petroleum Company. That request sought the following:

> "1. All documents produced by you in the suit entitled United States vs. Phillips Petroleum Company, Douglas Oil Company, et al.
>
> 2. All documents in your possession and under your control subpoened by the Grand Jury in its indictment of Phillips Petroleum Company, Douglas Oil Company, et al. for fixing, stabilizing and maintaining the price of rebrand gasoline.
>
> • • • •
>
> 4. All documents of any depositions, grand jury transcripts, or any other testimony given by any individual in the United States vs. Phillips Petroleum Company, Douglas Oil Company, et al., lawsuit."

On or about January 17, 1977 Douglas responded to Petrol Stops' request for production of documents by objecting to such production on the grounds that the

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* Some of the plaintiffs in this case are also plaintiffs in other related District of Arizona cases. Douglas, however, is a defendant only in the case identified above.

materials produced before the grand jury were not relevant to the Arizona lawsuit nor were they likely to lead to the discovery of admissible evidence. Petrol Stops has not moved in the Arizona Court for an order compelling production of these documents pursuant to Rule 37 of the Federal Rules of Civil Procedure in the District Court of Arizona, which it is entitled to do if it believes that the requested documents are discoverable. Nor has Petrol Stops moved for any order compelling discovery so as to require the District Court of Arizona to rule on the permissible scope of discovery in the lawsuit before it.

Douglas has copies of all grand jury documents and transcripts sought by Petrol Stops in its petition. Douglas stands ready to produce those materials should the Arizona Court determine that production is required under Rule 34. Thus, it appears that Petrol Stops is attempting to circumvent and avoid a determination by the Arizona District Court of the crucial issue of whether the requested documents are relevant to its lawsuit. One can only conclude that Petrol Stops is fearful of the Arizona Court's greater familiarity with the question of materiality in the Arizona litigation.

II. THE ARIZONA DISTRICT COURT IS BETTER ABLE TO DECIDE THE ISSUE OF THE PERMISSIBLE SCOPE OF DISCOVERY.

A. The Scope of Discovery is a Crucial Issue in This Case.

The permissible scope of discovery is an important and hotly contested issue in this case, and although a substantial amount of discovery has been conducted in this lawsuit, a judicial ruling as to the permissible scope of discovery by Petrol Stops has not been made. Such a determination will be the product of extended argument on both sides. Petrol Stops seeks a broad relevancy ruling — the complaint, for example, purports to allege

31 antitrust violations within its 17 pages. The deposition of Petrol Stops' chief executive officer, however, appears to have limited the subject matter of the suit to (1) the alleged attempts by defendants and co-conspirators to involve Petrol Stops in the fixing of the retail price of gasoline; and (2) upon the failure of Petrol Stops to comply with that alleged scheme, the alleged attempts by defendants to restrict supply and engage in predatory pricing practices. Because knowledge of all developments in the suit and actions by the parties is necessary to a well advised decision on the permissible scope of discovery, the Arizona Court, which is familiar with such matters, is in a much better position to determine the issues in the case before it.

B. Petrol Stops is Attempting to Circumvent Its Own Agreement with Respect to the Determination of Relevancy.

In recognition of the likely and continuing dispute regarding the scope of discovery, Petrol Stops consented to defer a judicial determination of relevancy as to the production of documents. By agreement between Petrol Stops and all defendants, discovery is now being conducted in two waves. In the contemplated first wave, defendants would respond to Petrol Stops' request for documents. Petrol Stops would then review those documents produced by defendants and re-request those not supplied which Petrol Stops deemed necessary to the prosecution of its lawsuit. At that time, relevancy questions would be argued by the parties and a determination made by the Court. This discovery strategy was mutually agreed upon by Petrol Stops and all defendants in the Arizona cases at a meeting in Phoenix, Arizona on October 29, 1976. What Petrol Stops now apparently is attempting to do in its petition before the California Court is to avoid that agreement by seeking a relevancy de-

termination from this Court and by so doing preclude other defendants not named in this particular petition from arguing the proper scope of discovery. Moreover, Petrol Stops is attempting to gain for itself two opportunities of having the relevancy issue judicially decided to its advantage. Considerations of fairness and judicial economy suggest that Petrol Stops should have but "one bite of the apple" and thus only one court should determine the relevancy of plaintiff's request for these materials. The more appropriate court for this task is the District Court of Arizona.

C. Granting Petrol Stops' Petition Would Not Serve Principles of Judicial Economy.

By taking this petition before the Central District Court of California, Petrol Stops also apparently seeks to avoid the judicial economy safeguards codified in Local Rule 42A.2[b] of the Arizona District Court. That rule requires that:

> "No discovery motions may be heard unless a statement of moving counsel is attached thereto certifying that after personal consultation and sincere efforts to do so, counsel have been unable to satisfactorily resolve the matter."

The local rules of the Central District of California (Rule 3(1)) contemplate the same procedure. The purpose of both local rules is to insure that judicial time is not spent ruling on an issue until both parties have made sincere attempts to resolve the issue among themselves and find that they cannot. Petrol Stops previously has requested these grand jury materials from Douglas. Douglas has the materials and has objected to their request. Petrol Stops has not sought an order compelling production nor has it met with legal representatives of Douglas as required by Arizona Local Rule 42A.2[b]. Instead, Petrol

Stops seeks to have the California Court permit inspection of those documents without compliance with either of the local rules.

D. The California Court's Familiarity With the Grand Jury Proceedings Is Not Determinative.

Finally, Douglas anticipates that Petrol Stops will argue that the familiarity of the Arizona Court with the Arizona case is offset by the knowledge of the California Court regarding the materials and subject matter of the grand jury investigation. But that argument is largely illusory. The Arizona Court can more easily identify the subject matter of the grand jury inquiry than the California Court can identify the relevant scope of Petrol Stops' lawsuit. The documents which Douglas produced in the grand jury investigation appear on the subpoena issued by the grand jury. The subject matter of the investigation appears in the indictment. The Arizona Court need only look at that subpoena and indictment and measure the request for those materials against its determination of the subject matter of the private civil suit to pass on relevancy challenges. On the other hand, the California Court would be required to review the extensive record of this lawsuit, already familiar to the Arizona Court, in order to determine whether the request documents are discoverable.

The Arizona Court must in the exercise of its judicial functions determine the issues which it will try and the discovery to be conducted in the case before it. Whether the documents submitted by Douglas and the transcripts of testimony of Douglas employees before the grand jury are relevant to that discovery is subject to the Arizona Court's Local Rule 42A.2[b] and to a Rule 37 determination by that Court. To substitute this Court's decision on such points, which in the final analysis would not be binding on the Arizona Court, would be a needless act.

III. PLAINTIFF HAS FAILED TO SHOW SUFFICIENT PARTICULARIZED NEED TO OBTAIN THE GRAND JURY MATERIALS.

In order to obtain permission to inspect grand jury documents pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, plaintiff must show "particularized need." The controlling case of *U.S. v. Procter and Gamble Co.*, 356 U.S. 677, states that the historic policy of grand jury secrecy:

> "must not be broken except where there is a compelling necessity. There are instances where that need will outweigh the countervailing policy. But they must be shown with particularity." 356 U.S. at 682.

Not only has Petrol Stops failed to show any particularized need, it has failed to show any need whatsoever.

As mentioned above, Douglas has all the documents which Petrol Stops now seeks and Petrol Stops has sought the production thereof. Upon instruction by the Arizona Court pursuant to Rule 37 it will produce those documents. Thus, if it is decided that those documents are relevant to Petrol Stops' lawsuit, Petrol Stops will get them. Petrol Stops can demonstrate no need to obtain the documents through its petition to this Court.

The argument which Petrol Stops does advance to purportedly demonstrate its "particularized need" is wholly specious and rests on crucial factual inaccuracies. In an effort to make the requisite showing, Petrol Stops argues as follows: In February of 1974 (over a year before the indictment was returned), it propounded interrogatories in which defendants were asked to state whether they had had any conversation or communication with their competitors regarding the wholesale price of gasoline sold to unbranded (independent) marketers in the western states. Both Phillips and Douglas responded to the above interrogatory stating that they were unaware of any such conversations or communications. Petrol Stops then states that Phillips and Douglas were indicted on federal charges of conspiring to "increase, fix, stabilize and maintain the price of rebrand gasoline" in five western states from 1970 through 1971 and that both Phillips and Douglas "entered *guilty* pleas to the charges of conspiracy and price-fixing contained in the indictment." Therefore, concludes Petrol Stops, both Phillips and Douglas must have perjured themselves in their answer to Petrol Stops' first set of interrogatories and inspection of the documents, therefore, is required to procure the information and to prove the perjury (pp. 2, 3 of Plaintiff's Memorandum in Support of Petition).

However, as the records of this Court will show, Douglas has never pleaded guilty to such charges and the logic of Petrol Stops' syllogism is therefore faulty. Some time after all of the other indicted companies had pleaded nolo contendere, or "no contest", to the charges against them, Phillips and Douglas decided, with the Court's approval, to change their pleas to nolo contendere. This plea is not the equivalent of a plea of guilty.

Moreover, Petrol Stops' counsel knew that Phillips and Douglas did not enter guilty pleas before he filed this petition. Petrol Stops' counsel filed earlier a petition and memorandum in support thereof erroneously in the *Southern* District Court of California. The documents erroneously filed there contained the same materials and arguments contained in the petition now before the Central District Court. At the joint plaintiff and defense counsel meeting held on October 29, 1976 in Phoenix, Arizona, counsel for both Douglas Oil Company and Phillips Petroleum Company informed counsel for Petrol Stops that defendants had not pleaded guilty and that the matters set forth in the defectively filed petition were untrue. Nevertheless, Petrol Stops through its counsel filed the identical factually erroneous document with the Central District Court of California.

IV. CONCLUSION.

Petrol Stops' case for access to the grand jury material is based on an incorrect statement of fact. More importantly, however, Petrol Stops has failed to disclose to this Court the existence of its Rule 34 request in the Arizona Court. If there is compelling need for Petrol Stops to obtain the documents sought by this petition, the Arizona Court can order such discovery from the Arizona defendants. The petitioners have given no valid reasons for this Court to attempt to make the determination of need best reserved for the Arizona Courts.

Douglas, therefore, respectfully requests that the petition herein be denied.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS, ET AL. *Petitioner,* v. UNITED STATES OF AMERICA, *Respondent.*	Misc. No. 5706 GOVERNMENT'S RESPONSE TO PETITION FOR PRODUCTION FOR INSPECTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA

The Government feels that petitioners have shown sufficient particularized need to be granted access to the grand jury transcripts and documents produced to Phillips Petroleum Company ("Phillips") and Douglas Oil Company of California ("Douglas") during the course of *United States v. Phillips Petroleum Company, et al.*, Cr. No. 75-337. The Government does not, therefore, oppose the Petition for Production for Inspection of

Transcripts of Grand Jury Testimony Produced Pursuant to Grand Jury Subpoena.

However, as to the documents, the Antitrust Division is acting as custodian of the documents which are the property of Phillips and Douglas. We therefore believe that Phillips and Douglas should be given an opportunity to be heard on this Petition to voice any objections they may have and have sent copies of the Petition to counsel for Phillips and for Douglas. We suggest that they be noticed and given an opportunity to be heard when a hearing on this Petition is held.

The Government would like to point out that representatives of Phillips and Douglas spent several weeks in Antitrust Division offices copying all of the requested documents onto microfiche. Phillips and Douglas also have copies of the grand jury transcripts of all witnesses who were their present or former employees. It is therefore respectfully suggested, if the Court determines that the Petition be granted, that the simplest and most convenient course would be for Phillips and Douglas to provide the microfiche directly to petitioners.

Dated: January 7, 1977

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST,
GAS-A-TRON OF ARIZONA,
AND COINOCO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR PRODUCTION FOR INSPECTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA

No. Misc. 5706

I. INTRODUCTION

Petitioners, plaintiffs in *Petrol Stops Northwest v. Continental Oil Company, et al.*, Civil No. 73-212 Tuc-JAW, and *Gas-A-Tron and Coinoco v. Union Oil Company, et al.*, Civil No. 73-191 Tuc-WCF, now pending in the United States District Court for the District of Arizona, are businesses headquartered in Tucson, Arizona, engaged in the retail distribution of gasoline in the states of Arizona, California, Oregon, Washington, Idaho, Minnesota, Missouri and Arkansas, through independent gasoline stations. Two of the defendants in these actions, Phillips Petroleum Company and Douglas Oil Company, were indicted by the federal grand jury in the United States District Court, Central District of California. The defendant Phillips Petroleum Company ("Phillips") is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined products, including gasoline, on a world-wide basis. The defendant Douglas Oil Company ("Douglas") is a wholly-owned subsidiary of the Continental Oil Company which markets ostensibly as an independent at the retail level. Douglas also supplies gasoline to retail distributors, including plaintiffs, through the Armour Oil Company.

Petitioner Petrol Stops Northwest, in December of 1973, filed a lawsuit in the United States District Court for the District of Arizona naming Phillips and Douglas, among others, as party defendants. The Complaint alleged violations of Sections 1 and 2 of the Sherman Act averring, in part, that defendants Phillips and Douglas had combined and conspired among themselves and with other named-defendants and co-conspirators to raise and fix the wholesale price of gasoline in certain western states.

Petitioners Gas-A-Tron of Arizona and Coinoco, in November of 1973, filed a lawsuit in the United States

District Court naming Phillips, among others, as party defendants. The Complaint alleged violations of Sections 1 and 2 of the Sherman Act averring, in part, that defendant Phillips had combined and conspired with other named-defendants and co-conspirators to raise and fix the wholesale price of gasoline in certain western states.

In February of 1974, plaintiffs propounded their first set of interrogatories to all defendants. Among the interrogatories propounded, defendants were asked to state whether their company at any time during the period commencing January 1, 1968, and ending December 14, 1974, had any conversation or communication with their competitors regarding the wholesale price of gasoline sold to unbranded (independent) marketers in the same western states. If the response to the above-interrogatory was in the affirmative, defendants were asked to identify all documents of the company during the discovery period disclosing or relating to any such conversation or communication and to specify each such conversation or communication. Phillips and Douglas responded to the above-interrogatory stating that it was unaware of any such conversations or communications. Accordingly, no documents were produced by these defendants relating to or concerning conversations or communications concerning prices at which independent or unbranded dealers sold or marketed gasoline in the western states and none were forthcoming. In particular, Phillips responded that:

> [s]ince October, 1969, it has been Phillips' policy to refrain from any conversations or communications with any and all of its competitors relating in any way to prices except in situations where Phillips is selling to or buying from a competitor and the price of the product being bought and sold obviously must be discussed.

On May 19, 1975, however, pursuant to the investigations of a grand jury impanelled in the Central District of California, Phillips and Douglas, among others, were indicted on federal charges of conspiring to "increase, fix, stabilize and maintain the price of rebrand gasoline" in five western states from mid-1970 through 1971. *United States v. Phillips, et al.*, No. 75-377. During the course of these criminal proceedings, both Phillips and Douglas were permitted to examine the grand jury transcripts of the testimonies of their employees. Consequently, Phillips and Douglas entered guilty pleas to the charges of conspiracy and price fixing contained in the indictment, and were duly fined for such violations. Criminal proceedings against these defendants now terminated, petitioners seek access to the above-mentioned transcripts.

II. THE GRAND JURY TRANSCRIPTS MADE AVAILABLE TO PHILLIPS AND DOUGLAS ARE NOT PROTECTED BY RULE 6(e) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 6(e) of the Federal Rules of Criminal Procedure ordinarily protects proceedings of grand jury from disclosure. Once the actual transcripts of the proceedings have been made available for inspection by defendants in a criminal proceeding, however, those transcripts are no longer protected by Rule 6(e) of the Federal Rules of Criminal Procedure.

In factual situations nearly identical to the present case, courts have consistently allowed civil plaintiffs access to grand jury transcripts. The Ninth Circuit in *U.S. Industries, Inc. v. United States District Court for the Southern District of California*, Central Division, 345 F.2d 18 (9th Cir. 1965), ruled that grand jury proceedings may be disclosed to civil litigants where the defendant was permitted to inspect portions of the proceedings.

In *U.S. Industries, Inc.*, defendants pleaded *nolo contendere* to an indictment for violation of Section 1 of the Sherman Act. Prior to the termination of the criminal proceedings, six civil suits were commenced against U.S. Industries, Inc. and others, for the same violations of the antitrust laws. During the course of the civil litigation, the private plaintiffs were given access to a memorandum prepared by the government which contained material within the purview of 6(e) of the Federal Rules of Criminal Proceedings. U.S. Industries, Inc. petitioned the court to reseal the memorandum. The issue presented to the court was whether the district court committed an abuse of discretion by permitting civil plaintiffs access to the government memorandum which had previously been sealed because of reference to grand jury proceedings.

The court in *U.S. Industries, Inc.* began its analysis of the issue by noting that the rule of secrecy surrounding the grand jury is not absolute in nature. (345 F.2d at 21.) The court then recognized that "in order to dispense with the secrecy a 'particularized and compelling need' must be demonstrated." (345 F.2d at 21.) The court stated that the trial judge has the initial discretion to determine whether such a "need" exists, and that where the reasons for maintaining secrecy "do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need." (345 F.3d at 21.) The court stated that the reasons for secrecy are:

> (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation

of perjury or tampering with the witnesses who may testify before the grand jury and who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

The court found that the first three reasons and the fifth reason were irrelevant since the grand jury had completely terminated its proceedings against all defendants, and pleas has been entered by all defendants. The court found that since the parties opposing disclosure had an opportunity to inspect the memorandum, the fourth reason for secrecy was insignificant and a liberal discovery ruling was in order. Although the court did not say what "need" was demonstrated, its ruling permitting disclosure demonstrates that where the party opposing disclosure has been given access to the documents, the reasons for maintaining secrecy apply "to only an insignificant degree." The court did state, *in dicta*, that perjury, albeit of a grand jury witness, is a pressing need which would warrant disclosure.

Disclosure of grand jury transcripts for the purpose of impeachment and testing credibility was approved *In re Cement-Concrete Block*, 381 F. Supp. 1108 (N.D. Ill. 1974). In *In re Cement-Concrete Block*, civil plaintiffs sought access to grand jury transcripts then in the possession of the Antitrust Division of the Department of Justice. The grand jury in that instance had returned indictments against members of the concrete block industry in the Chicago area for possible violations of the antitrust laws to which defendants entered *nolo contendere* pleas. During the course of the criminal proceedings some of the

defendants inspected the grand jury transcripts of their corporate personnel's testimony. Subsequently, private litigants brought antitrust charges against the same defendants and petitioned the court for access to the same transcripts examined by defendants.

In considering the petition, the court set forth the same five reasons for secrecy as set out in *U.S. Industries, Inc., supra*. The court noted that the first three reasons were no longer applicable, "in that the grand jury proceedings and all criminal proceedings arising therefrom have been completed." The court noted, in this regard, that the Supreme Court in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233 (1940), stated that "[g]rand jury testimony is ordinarily confidential. . . . but after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." The fifth reason was found no longer relevant "because indictments were returned against all the corporate respondents." (381 F. Supp. at 1110.) The court noted that the fourth policy reason had been "partially vitiated because the respondents previously inspected the grand jury transcripts of their employees during the course of the prior criminal proceedings," and further stated that the policy reasons of secrecy would be preserved by limiting disclosure to the attorneys of record in the civil case "for use in the litigation only for the purposes of impeachments, refreshing the witness' recollection and testing credibility." (381 F. Supp. at 1110.)

Most recently, the United States District Court, District of Arizona in *In re Arizona Dairy Products Litigation*, 1976-1 Trade Reg. Rep. ¶ 60,910 (D. Ariz. 1976), permitted disclosure of presentencing memoranda, prepared in part from grand jury material where the only need asserted was "expedition of plaintiff's pretrial discovery." In *In re Arizona Dairy Products*, defendant had entered pleas of *nolo contendere* to indictments alleging violation of the

antitrust laws. In subsequent civil litigation, private plaintiffs sought access to presentencing memoranda which had been disclosed to attorneys for individual defendants but not to counsel for corporate defendants. The court entered an order directing the Department of Justice to produce the memoranda. The order was stayed pending a petition for writ of mandamus or prohibition to the Ninth Circuit. The order to stay was vacated, however, when the Ninth Circuit dismissed the petition stating it was "unable to find that the [Arizona] district court abused its discretion [in ordering production of the memoranda]." *See also In re Sugar Antitrust Litigation,* 1976-1 Trade Reg. Rep. ¶ 60,934 (N.D. Cal., June 10, 1976), where the defendants in a civil antitrust action were ordered to produce to plaintiffs all grand jury transcripts previously produced to defendants. Judge Boldt stated that:

> [b]ecause defendant C and H had the opportunity to inspect and analyze the transcripts during the course of the prior government proceedings, the policy reasons supporting the rule of grand jury secrecy have been vitiated by that prior disclosure. These grand jury transcripts are relevant to the pending treble damage actions and no further showing of particularized need is required to permit disclosure of these transcripts to plaintiffs. It would be inequitable and adverse to the principles of federal discovery to prevent plaintiffs from having equal access to these transcripts.

In the instant case, Phillips and Douglas were indicted for the fixing of prices of rebrand gasoline in certain western states. During the course of the criminal proceedings, Phillips and Douglas examined grand jury transcripts of the testimonies of their employees. Subsequently, both defendants entered guilty pleas, and accordingly, criminal proceedings were terminated and have been terminated against all other parties indicted by the same grand jury. Petitioners, as plaintiffs in civil

actions alleging price fixing of rebrand gasoline in the same western states and during the same time frame for which defendants were indicted, are now clearly entitled to examine the grand jury transcripts made available to Phillips and Douglas to impeach their statements in answers to interrogatories and to expedite the discovery process.

III. THE PRODUCTION OF MATERIAL SUBPOENAED BY THE GRAND JURY WILL NOT INVADE THE SECRECY OF THE GRAND JURY.

Ordinarily, documents produced pursuant to a grand jury subpoena for use during its proceedings are protected by Rule 6(e), Federal Rules of Criminal Procedure, on the grounds that disclosure of such documents would be an "indirect" disclosure of matters occurring before the grand jury. However, when the reasons for protection of grand jury transcripts "do not apply at all in a given situation, or apply to only an insignificant degree," *U.S. Industries, Inc., supra* at 21, the documents produced pursuant to a grand jury subpoena, *a fortiori,* are entitled to no greater protection than the grand jury transcripts themselves — the transcripts manifestly constituting "matters occurring before the grand jury." Rule 6(e), Fed. R. Crim. P., whereas the document at best indirectly "occur" before the grand jury.

As amply demonstrated above, the reasons for preservation of secrecy "do not apply at all . . . or apply to only an insignificant degree" (*Id.*) in the instant isutation, *i.e.,* all criminal proceedings against all defendants have terminated, and defendants Phillips and Douglas were given access to grand jury transcripts of the testimonies of their employees.

Petitioners, Petrol Stops Northwest, Gas-A-Tron and Coinoco, have demonstrated a specific and compelling

need for an order directing the production of these documents in that defendants have perjured themselves in stating that they are unaware of any conversations or communications with regard to price of rebrand gasoline, when, in fact, defendants, subsequent to responding to petitioners' interrogatories, pleaded guilty to price fixing of rebrand gasoline in the areas and during the times complained of in petitioners' complaints. As stated in *U.S. Industries, Inc., supra* at 21, where the policy reasons of Rule 6(e) are partially or wholly vitiated, "the party seeking disclosure should not be required to demonstrate a large compelling need." Petitioners have demonstrated more than ample need since the denial of such conversations or communications relating to price of rebrand gasoline by Douglas and Phillips places the discovery process in an impasse situation.

Even in instances where the policy reasons for preservation of secrecy of grand jury proceedings are applicable, the trial judge may permit civil litigants to examine documents held under a federal grand jury subpoena duces tecum.

In *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960), the Second Circuit allowed the ICC to examine records held under a grand jury subpoena. The court noted that disclosure of documents produced pursuant to a grand jury subpoena were protected from disclosure by Rule 6(e), but stated that:

> It is not the purpose of the Rule to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake — for its intrinsic value in the furtherance of a lawful investigation — rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents

> had been, or were presently being, examined by a grand jury. (*Id.* at 54.)

The court further stated that the ICC did not seek to learn what use the grand jury made of the records and that the ICC had independent authority to examine the records, thus removing them from the prohibition against disclosure of Rule 6(e). (*Id.* at 54.)

In the instant case petitioners are not specifically seeking those documents produced by Phillips and Douglas which were presented to the grand jury, but are seeking all documents produced by Phillips and Douglas which are relevant and material to the allegations of petitioners' complaints, and which should have been produced pursuant to interrogatories propounded to defendants. Petitioners thus are not seeking to learn, via the documents, what took place before the grand jury, but seeks such documents for their intrinsic value in the furtherance of petitioners' lawful investigation.

The court stated that the applicable test in this regard was whether independent legal authority for the inspection existed and whether the examination sought would be in violation of Rule 6(e). (*Id.*)

Although the ruling in *Interstate Dress Carriers, Inc.* involved a governmental agency, the court in *Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co.*, 211 F. Supp. 729 (N.D. Ill. 1962), made it clear that this ruling applies to private civil litigants as well. In *Commonwealth Edison*, the above-cited passage from *Interstate Dress Carriers, Inc.* was cited with approval in upholding a pretrial order directing production by defendants of documents "produced by such defendant before any grand jury in the Eastern District of Pennsylvania in the course of investigations leading to the return of the indictments in that Court in 1960." (211 F. Supp. at 732.) Independent legal authority, therefore, exists in

the legitimate exercise of discovery of these documents, which are relevant and material to the issues in the instant litigation.

The examination of the material sought would not be in violation of Rule 6(e) in this instance because the reasons for maintaining secrecy do not apply or apply only to an insignificant degree. Even were Rule 6(e) found to be applicable, petitioners have demonstrated a compelling need for a order directing such documents to be made available for inspection.

CONCLUSION

The trial court has discretion to permit private litigants to inspect grand jury transcripts and to make available to private litigants all documents produced to a grand jury pursuant to a federal grand jury subpoena. If Rule 6(e) is applicable, the party seeking access to such transcripts or documents must demonstrate a sufficient need for the transcripts or documents. When Rule 6(e) is no longer applicable, access to grand jury material is more readily given. In the instant case, the reasons for Rule 6(e) are inapplicable or applicable only to an insignificant degree. Petitioners have also demonstrated a particular need which in and of itself constitutes adequate reason for allowing petitioners access to the transcripts and documents.

Upon the foregoing, petitioners respectfully request this Court to make available for inspection the grand jury transcripts which were made available to Phillips and Douglas, and an order directing that all documents produced by Phillips and Douglas pursuant to the grand jury subpoena be produced to petitioners.

DATED this 15th day of December, 1976.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETROL STOPS NORTHWEST, GAS-A-TRON OF ARIZONA, and COINOCO, *Petitioners,* vs. UNITED STATES OF AMERICA, *Respondent.*	PETITION FOR PRODUCTION FOR INSPECTION OF TRANSCRIPTS OF GRAND JURY TESTIMONY AND DOCUMENTS PRODUCED PURSUANT TO GRAND JURY SUBPOENA No. Misc. 5706

The petitioners, plaintiffs in two actions, Civil Nos. 73-212 Tuc-JAW and 73-191 Tuc-WCF, now pending in the United States District Court for the District of

Arizona, by and through their attorneys of record, pursuant to Rule 34 of the Federal Rules of Civil Procedure, hereby move the United States District Court, Central District of California to make available for inspection by petitioners' attorneys of record, all transcripts of grand jury testimony which were made available to Phillips Petroleum Company ("Phillips") and Douglas Oil Company ("Douglas") in *United States v. Phillips, et al.,* Criminal Docket No. 75-377, filed in the United States District Court, Central District of California and to order the Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice to produce all documents produced by Phillips and Douglas which were subpoenaed by the grand jury in *United States v. Phillips, et al.,* No. 75-377, said documents currently believed to be in the custody of the Chief of the Los Angeles Office of the Antitrust Division of the United States Department of Justice pursuant to an impounding order issued by the United States District Court, Central District of California.

As more fully set forth in the appended memorandum of points and authorities filed herewith, this Petition is made on the grounds that:

(1) Petitioners are in need of said grand jury transcripts and documents produced pursuant to the grand jury subpoena in order to show that Phillips and Douglas have perjured themselves in answers to certain interrogatories propounded to them by petitioners Petrol Stops Northwest, Gas-A-Tron of Arizona and Coinoco in connection with *Petrol Stops Northwest v. Continental Oil Company, et al.,* Civ. No. 73-212 Tuc-JAW and *Gas-A-Tron, et al., v. Union Oil Company, et al.,* Civ. No. 73-191 TUC-WCF, now pending in the United States District Court for the District of Arizona;

(2) The disclosure of the transcripts will not invade the secrecy of the grand jury in that the documents have already been inspected by the defendants in *U.S. v. Phillips, et al.*, No. 75-377, who are also defendants in the actions listed above now pending in the Arizona District Court.

(3) The production of material subpoenaed by the grand jury will not invade the secrecy of the grand jury;

(4) The transcripts and documents are material and relevant to the pending civil antitrust action and their production and disclosure will further the efficient administration of justice; and

(5) It would be inequitable and adverse to the principles of federal discovery to allow one party (defendants Phillips and Douglas) access to government documents and not the other (petitioners).

On the basis of the foregoing and the memorandum of points and authorities submitted herewith, petitioners pray this Court to allow petitioners' counsel of record to examine, inspect, copy or produce all transcripts of grand jury testimony which were made available to Phillips and Douglas in *United States v. Phillips, et al.*, No. 75-377, and to direct the Department of Justice to produce all documents, records and files in its custody and possession which were produced by Phillips and Douglas pursuant to grand jury subpoena in *United States v. Phillips, et al.*, No. 75-377.

DATED this 1st day of December, 1976.

Respectfully submitted,

By

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, v. PHILLIPS PETROLEUM COMPANY; DOUGLAS OIL COMPANY OF CALIFORNIA; POWERINE OIL COMPANY; FLETCHER OIL & REFINING COMPANY; GOLDEN EAGLE REFINING COMPANY, INC.; and MACMILLAN RING-FREE OIL COMPANY, INC., *Defendants.*	Criminal No. . . . . INDICTMENT FOR VIOLATION OF TITLE 15 U.S.C. § 1 (Sherman Antitrust Act) Filed: . . . . .

INDICTMENT

The Grand Jury charges:

I. DEFINITIONS

1. As used herein the term:

(a) "Rebrand gasoline" shall mean gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner; and

(b) "Western area" shall mean the States of California, Oregon, Washington, Nevada, and Arizona.

II. DEFENDANTS

2. Phillips Petroleum Company (Phillips) is hereby indicted and made a defendant herein. Phillips is a Delaware corporation, with its principal office in Bartlesville, Oklahoma. In 1970, Phillips had assets in excess of $3 billion and sales in excess of $2 billion, including sales of approximately 350 million gallons of rebrand gasoline in the Western area, of which approximately 180 million gallons were sold to Golden Eagle Refining Company, Inc.

3. Douglas Oil Company of California (Douglas), is hereby indicted and made a defendant herein. Douglas, a wholly-owned subsidiary of Continental Oil Corporation, is a California corporation with its principal office in Costa Mesa, California. In 1970, Douglas had assets of about $58 million and sales of approximately 100 million gallons of rebrand gasoline in the Western area.

4. Powerine Oil Company (Powerine) is hereby indicted and made a defendant herein. Powerine is a California corporation with its principal office in Santa Fe Springs, California. In 1970, Powerine had assets of $30 million, and sales in excess of $50 million, including sales of approximately 190 million gallons of rebrand gasoline in the Western area.

5. Fletcher Oil & Refining Company (Fletcher) is hereby indicted and made a defendant herein. Fletcher is a California corporation with its principal office in Wilmington, California. In 1970, Fletcher had assets in excess of $9 million and sales in excess of $30 million, including sales of approximately 90 million gallons of rebrand gasoline in the Western area.

6. Golden Eagle Refining Company, Inc. (Golden Eagle) is hereby indicted and made a defendant herein. Golden Eagle, a wholly-owned subsidiary of Ultramar Co. Ltd., is a Delaware corporation with its principal office in Los Angeles, California. In 1970, Golden Eagle had assets in excess of $21 million and sales in excess of $40 million, including sales of approximately 180 million gallons of rebrand gasoline in the Western area.

7. MacMillan Ring-Free Oil Company, Inc. (MacMillan) is hereby indicted and made a defendant herein. MacMillan is a Delaware corporation with its principal office in New York, New York. In 1970, MacMillan had assets in excess of $16 million and sales in excess of $35 million, including sales of approximately 70 million gallons of rebrand gasoline in the Western area.

III. CO-CONSPIRATORS

8. Various other corporations, firms and individuals, not made defendants in this indictment have participated as co-conspirators in the offense charged herein and have performed acts and made statements in furtherance thereof.

IV. TRADE AND COMMERCE

9. Gasoline is one of the primary products which results from the refining of crude oil. Most oil refiners, including the defendants, buy, sell and exchange gasoline among themselves and own or control trademarks or brand names under which gasoline is sold to the consumer. In addition, the defendants sell rebrand gasoline in the Western area to buyers who either resell the gasoline through service stations directly to the public or who resell the gasoline to service stations for ultimate resale to the public. In 1970, the defendants sold approximately 800 million gallons of rebrand gasoline with a wholesale value in excess of $90 million.

10. A substantial amount of the rebrand gasoline sold by the defendants in the Western area is refined from crude oil which is produced in states other than California and shipped into California to be refined. Also, there is a substantial, regular and continuous flow of defendant's rebrand gasoline to buyers located outside the state where such gasoline is refined.

V. OFFENSE CHARGED

11. Beginning at least as early as July 1970, the exact date being to the grand jurors unknown, and continuing thereafter at least through 1971, [the defendants and co-conspirators have engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce] in violation of Section 1 of the Act of Congress of July 2, year 1890, *(sic)* as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which have been to increase, fix, stabilize and maintain the price of rebrand gasoline.

13. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do.

VI. EFFECTS

14. The aforesaid combination and conspiracy has had, among other things, the following effects:

(a) the price of rebrand gasoline has been *raised,* fixed, stabilized and maintained *at artificial and non-competitive* levels;

(b) price competition in the sale of rebrand gasoline has been suppressed; and

(c) customers buying rebrand gasoline have been deprived of the opportunity to buy rebrand gasoline in a free and unrestricted market.

VII. JURISDICTION AND VENUE

15. The aforesaid combination and conspiracy was formed and carried out by the defendants and co-conspirators in part within the Central District of California, and within the jurisdiction of this Court, within the five years preceding the return of this indictment.

DATED:

A TRUE BILL

Foreman	RAYMOND P. HERNACKI
THOMAS E. KAUPER *Assistant Attorney General*	STANLEY E. DISNEY
BADDIA J. RASHID	EDWIN D. HAUSMANN
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* v. PHILLIPS PETROLEUM COMPANY; DOUGLAS OIL COMPANY OF CALIFORNIA; POWERINE OIL COMPANY; FLETCHER OIL & REFINING COMPANY; GOLDEN EAGLE REFINING COMPANY, INC.; and MACMILLAN RING-FREE OIL COMPANY, INC., *Defendants.*	Civil No. 75 974HP COMPLAINT FOR INJUNCTIVE RELIEF FOR VIOLATION OF TITLE 15 U.S.C. § 1 (Sherman Antitrust Act) Filed:

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants named herein and complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the above-named defendants, as hereinafter alleged, of Section 1 of said Act, as amended (15 U.S.C. § 1).

2. Each of the defendants maintains an office, transacts business or is found within the Central District of California.

II. DEFINITIONS

3. As used herein the term:

(a) "Rebrand gasoline" shall mean gasoline sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner; and

(b) "Western area" shall mean the States of California, Oregon, Washington, Nevada, and Arizona.

III. DEFENDANTS

4. Phillips Petroleum Company (Phillips) is made a defendant herein. Phillips is a Delaware corporation with its principal office in Bartlesville, Oklahoma. In 1970, Phillips had assets in excess of $3 billion and sales in excess of $2 billion, including sales of approximately 350 million gallons of rebrand gasoline in the Western area of which approximately 180 million gallons were sold to Golden Eagle Refining Company, Inc.

5. Douglas Oil Company of California (Douglas) is made a defendant herein. Douglas, a wholly-owned subsidiary of Continental Oil Corporation, is a California corporation with its principal office in Costa Mesa, California. In 1970, Douglas had assets of approximately

$58 million and sales of approximately 100 million gallons of rebrand gasoline in the Western area.

6. Powerine Oil Company (Powerine) is made a defendant herein. Powerine is a California corporation with its principal office in Santa Fe Springs, California. In 1970, Powerine had assets in excess of $30 million, and sales in excess of $50 million, including sales of approximately 190 million gallons of rebrand gasoline in the Western area.

7. Fletcher Oil & Refining Company (Fletcher) is made a defendant herein. Fletcher is a California corporation with its principal office in Wilmington, California. In 1970, Fletcher had assets in excess of $9 million and sale in excess of $30 million, including sales of approximately 90 million gallons of rebrand gasoline in the Western area.

8. Golden Eagle Refining Company, Inc. (Golden Eagle) is made a defendant herein. Golden Eagle, a wholly-owned subsidiary of Ultramar Co. Ltd., is a Delaware corporation with its principal office in Los Angeles, California. In 1970 Golden Eagle had assets in excess of $21 million and sales in excess of $40 million, including sales of approximately 180 million gallons of rebrand gasoline in the Western area.

9. MacMillan Ring-Free Oil Company, Inc. (MacMillan) is made a defendant herein. MacMillan is a Delaware corporation with its principal office in New York, New York. In 1970, MacMillan had assets in excess of $16 million and sales in excess of $35 million, including sales of approximately 70 million gallons of rebrand gasoline in the Western area.

IV. CO-CONSPIRATORS

10. Various other corporations, firms and individuals not made defendants in this complaint have participated

as co-conspirators in the violation alleged herein and have performed acts and made statements in furtherance thereof.

V. TRADE AND COMMERCE

11. Gasoline is one of the primary products which results from the refining of crude oil. Most oil refiners, including the defendants, buy, sell and exchange gasoline among themselves and own or control trademarks or brand names under which gasoline is sold to the consumer. In addition, the defendants sell rebrand gasoline in the Western area to buyers who either resell the gasoline through service stations directly to the public or who resell the gasoline to service stations for ultimate resale to the public. In 1970, the defendants sold approximately 800 million gallons of rebrand gasoline with a wholesale value in excess of $90 million.

12. A substantial amount of the rebrand gasoline sold by the defendants in the Western area is refined from crude oil which is produced in states other than California and shipped into California to be refined. Also, there is a substantial, regular and continuous flow of defendant's rebrand gasoline to buyers located outside the state where such gasoline is refined.

VI. VIOLATION ALLEGED

13. Beginning at least as early as July 1970, the exact date being to the plaintiff unknown, and continuing thereafter at least through 1971, the defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

14. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which have been to increase, fix, stabilize and maintain the price of rebrand gasoline.

15. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators have done those things which they combined and conspired to do.

VII. EFFECTS

16. The aforesaid combination and conspiracy had had, among other things, the following effects:

(a) the price of rebrand gasoline has been raised, fixed, stabilized and maintained at artificial and non-competitive levels;

(b) price competition in the sale of rebrand gasoline has been suppressed; and

(c) customers buying rebrand gasoline have been deprived of the opportunity to buy rebrand gasoline in a free and unrestricted market.

PRAYER

WHEREFORE, the plaintiff prays:

A. That the Court adjudge and decree that the defendants have engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

B. That each of the defendants, its successors, subsidiaries and transferees, and the respective officers, di-

rectors, agents, and employees thereof, and all other persons acting or claiming to act on its behalf, be perpetually enjoined and restrained from in any manner, directly or indirectly, continuing, maintaining or reviving the conspiracy, and from engaging in any other combination, conspiracy, agreement, understanding, or concert of action having a similar purpose or effect and from adopting or following any practice, plan, program or device having a similar purpose or effect.

C. That plaintiff have such other, further, general and different relief as the Court may deem just and proper in the premises.

D. That plaintiff recover the costs of this suit.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PETROL STOPS NORTHWEST,
Plaintiff,
vs.
CONTINENTAL OIL COMPANY;
DOUGLAS OIL COMPANY;
GULF OIL COMPANY;
SHELL OIL COMPANY;
EXXON CORPORATION;
MOBIL OIL CORPORATION;
UNION OIL COMPANY OF CALIFORNIA;
AMOCO OIL COMPANY;
STANDARD OIL COMPANY OF CALIFORNIA;
STANDARD OIL COMPANY OF INDIANA;
PHILLIPS PETROLEUM COMPANY;
and, ARMOUR OIL COMPANY;
Defendants.

COMPLAINT
(Jury Trial Demanded)
Civil No. 73-212
TUC
JAW

The plaintiff complains of the above-named defendants and demanding trial by jury alleges as follows:

JURISDICTION

1. This Complaint is filed and the jurisdiction of this Court is invoked under the provisions of Sections 4 and 16

of the Act of Congress of October 15, 1914, C. 323, 38 Stat. 731, as amended (15 U.S.C. 15, 26). The plaintiff seeks to recover treble the amount of damages sustained by the plaintiff by reason of the defendants' violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended (15 U.S.C. 1, 2), commonly known as the Sherman Act, and to prevent and restrain such violations.

2. The defendants are presently qualified to do business in the State of Arizona and in fact have transacted business at all times alleged herein within the above-described district. The predatory conduct of the defendants alleged herein was undertaken and implemented in part within the above-described district.

3. The business of producing, transporting, manufacturing and marketing petroleum and refined petroleum products is within and directly and substantially affects trade and commerce among the several states.

DESCRIPTION OF THE PARTIES

4. The plaintiff, Petrol Stops Northwest, is a partnership whose headquarters is located at 302 South Plummer, Tucson, Arizona, and is engaged in the retail distribution of gasoline in the states of Arizona, California, Oregon, Washington, Idaho, Minnesota, Missouri and Arkansas, through independent gasoline stations. Petrol Stops Northwest distributes gasoline at retail through gasoline stations owned or leased and operated by Petrol Stops Northwest and through gasoline stations located on the premises of small grocery stores and other businesses which are operated as a joint venture between Petrol Stops Northwest and the owner-operators of these businesses. Prior to January 1, 1973, Petrol Stops Northwest distributed gasoline through 104 gasoline stations selling an annual volume of approximately 70 million gallons of

gasoline in 1972. Since January 1, 1973, the plaintiff's supply of gasoline has been drastically reduced pursuant to violations of the antitrust laws alleged in this Complaint and plaintiff has seriously curtailed its business operations and been forced to close many of its outlets.

5. The defendant Continental Oil Company is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. The defendant Douglas Oil Company is a wholly-owned subsidiary of Continental Oil Company which markets ostensively as an independent at the retail level under various brands including "Douglas", "Fast Gas", "Econo" and "Nugget". Douglas also supplies gasoline to plaintiff at wholesale through the defendant Armour Oil Company. Continental Oil Company in 1972 had gross operating income of approximately $3.4 billion, net income of $170 million and current assets in excess of $957 million. Continental Oil Company marketed gasoline under the "Conoco" brand throughout the United States. Continental Oil Company has undertaken extensive and costly advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Conoco" & "Douglas" brands. In Arizona, California, Oregon and Washington, Continental Oil Company markets refined petroleum products including gasoline through branded jobbers and dealers under the Conoco and Douglas brands. The gasoline sold by Continental Oil Company is manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its customers in Arizona by way of pipeline across state lines. The gasoline marketed by Continental Oil Company moves in the flow of interstate commerce.

6. The defendant Gulf Oil Company is a major integrated oil company engaged in the production, transpor-

tation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Gulf in 1973 had gross operating income of approximately $6.2 billion, net income of $447 million and current assets in excess of $2.9 billion. Gulf Oil Company marketed gasoline under the "Gulf" brand name throughout the United States. Gulf has undertaken extensive and costly advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Gulf" brand. In Arizona, California, Washington and Oregon Gulf has marketed gasoline through branded jobbers and dealers under the Gulf brand. It supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. The gasoline marketed by Gulf moves in the flow of interstate commerce.

7. The defendant Shell Oil Company is a major integrated oil company engaged in the production, transportation, manufacturing, and marketing of petroleum and refined petroleum products, including gasoline, on a world-wide basis. Shell in 1972 had gross income in excess of $4 billion, net income in excess of $260 million, and assets in excess of $1.5 billion. Shell markets gasoline under the "Shell" brand name throughout the continental United States. It has undertaken extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Shell" brand. Shell supplies its dealers and jobbers in Arizona, California, Washington and Oregon with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipelines across state lines. Gasoline marketed by Shell moves and has moved in the flow of interstate commerce.

8. The defendant Exxon Corporation, formerly Standard Oil of New Jersey, is the world's leading integrated petroleum enterprise and is engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Exxon in 1971 had gross operating income in excess of $20 billion, net income in excess of $1.5 billion and total current assets in excess of $7 billion. Exxon markets gasoline under the "Exxon", "Humble" and "Esso" brands throughout the world. Exxon has undertaken extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Exxon" brand. It has entered into extensive agreements for the exchange of gasoline and gasoline products with other defendants and co-conspirators which permit it to expand its geographic scope of operation and attain a level of integration far beyond the capacity of its facilities and supply. The gasoline marketed by Exxon in Arizona moves and has moved in the flow of interstate commerce.

9. The defendant Mobil Oil Corporation is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Mobil in 1971 had gross income in excess of $8.2 billion, net income in excess of $1.1 billion, and assets in excess of $8.4 billion. Mobil markets gasoline under the "Mobil" brand name in the western, midwestern and southeastern United States. Mobil had undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its "Mobil" brand. Mobil supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Mobil in

Arizona moves and has moved in the flow of interstate commerce.

10. The defendant Union Oil Company of California is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Union in 1972 had gross sales of approximately $2.5 billion, net earnings of $121.9 million and assets in excess of $2.6 billion. Union marketed gasoline under the "Union 76" brand name throughout the United States. Union has undertaken extensive and costly advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Union 76" brand. In Arizona, California, Washington and Oregon, Union has marketed gasoline through branded jobbers and dealers under the Union brand. It supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. The gasoline marketed by Union Oil Company moves in the flow of interstate commerce.

11. The defendant Amoco Oil Company is a wholly-owned subsidiary of defendant Standard Oil Company of Indiana. Standard Oil Company of Indiana is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Standard Oil of Indiana in 1971 had gross sales of approximately $8.5 billion, net income in excess of $341 million, and assets in excess of $5.6 billion. Amoco Oil Company (formerly known under the firm name of American Oil Company) is or has been engaged in the manufacturing and marketing of petroleum and refined petroleum products, including gasoline, throughout the continental United States, including California,

Washington and Oregon. Amoco markets or has marketed gasoline in Arizona under the "Amoco" and "Standard" brands. Prior to January 1, 1973, Amoco also marketed under the "American" brand. In Arizona, Amoco markets gasoline through branded dealers and jobbers and on a company-operated basis. Amoco has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its brand names. Amoco supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. The gasoline marketed by Amoco in Arizona moves in the flow of interstate commerce.

12. The defendant Standard Oil Company of California is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Standard Oil Company in 1972 had gross sales of approximately $5.8 billion, net earnings of $6.4 million, and assets in excess of $2.3 billion. Standard markets gasoline under the "Chevron" and "Standard" brand names throughout the continental United States. Standard Oil Company of California has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its "Chevron" and "Standard" brands. Standard supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Standard in Arizona moves and has moved in the flow of interstate commerce.

13. The defendant Phillips Petroleum Company is a major integrated oil company engaged in the production,

transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. In 1971, Phillips Petroleum had gross income in excess of $2.3 billion, net income in excess of $132 million, and assets in excess of $3.7 billion. Phillips Petroleum markets gasoline under the "Phillips" brand name throughout the continental United States. Phillips Petroleum has also undertaken to market gasoline on a self-serve basis under various secondary or "fighting brands" including "Seaside", "Red Dot" and "Blue Goose". It has undertaken extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Phillips", "Seaside", "Red Dot" and "Blue Goose" brands. Phillips supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Phillips in Arizona moves and has moved in the flow of interstate commerce.

14. The defendant Armour Oil Company is a wholesaler and retailer of refined petroleum products and operates a large fleet of tank trucks as a common carrier in the transporting of the petroleum products which Armour Oil sells at the wholesale and retail levels. Armour Oil sells refined petroleum products at wholesale to various independent retail markets in California, Oregon, Washington and Arizona and distributes and transports refined petroleum products for various defendants. Armour Oil also sells refined petroleum products through retail outlets in the eastern portion of the United States and Hawaii under the "Armour" brand. Armour Oil Company has sold gasoline to the plaintiff in Washington, Oregon, California and Arizona. The gasoline which Armour Oil Company has sold to the plaintiff was purchased from the defendants Douglas Oil Company and Gulf Oil Company. Beginning in November of

1972 the defendant Armour Oil Company, Douglas Oil Company, Continental Oil Company and Gulf Oil Company, in furtherance of the contracts, combinations and conspiracies alleged herein, have severely limited and restricted the quantity of gasoline to be sold to the plaintiff. Armour has continued to limit and restrict the quantity of gasoline sold to the plaintiff by Armour and to refuse to sell to the plaintiff the quantities of gasoline to which it is entitled from 1972 until the present.

CO-CONSPIRATORS

15. The major integrated oil companies, including Signal Oil & Gas Company and Time Oil Company, that have not been named at this time as defendants in this Complaint have shared a common business motivation with the named defendant major integrated oil companies to dominate and control the manufacture and distribution of petroleum and refined petroleum products in the United States and have participated with the named defendants in the illegal contracts, combinations and conspiracies alleged in this Complaint and are designated in this Complaint as co-conspirators of the named defendants.

SHERMAN ACT OFFENSES

16. Commencing at a period of time four years prior to the filing of this Complaint, the exact date being unknown to the plaintiffs, and continuing uninterruptedly up to and including the date of the filing of this Complaint, the defendants and their co-conspirators have contracted, combined and conspired in restraint of trade in the manufacture, sale and distribution of petroleum and refined petroleum products and have combined and conspired to monopolize trade and commerce in the manufacture, sale and distribution of petroleum and refined petroleum products and each of the defendants has at-

tempted to monopolize trade and commerce in the manufacture, sale and distribution of petroleum and refined petroleum products in violation of Sections 1 and 2 of the Sherman Act. Such continuing contracts, combinations, conspiracies and attempts to monopolize have substantially and directly affected trade and commerce in the manufacture, sale and distribution of petroleum and refined petroleum products among the several states and have substantially and directly affected trade and commerce in the manufacture, sale and distribution of petroleum and refined petroleum products in the states of California, Oregon and Washington. Specifically the defendants and their co-conspirators have done the following things:

A. The defendants and their co-conspirators have combined and conspired to dominate and control the manufacture and distribution of petroleum and refined petroleum products and to suppress and eliminate competition in the manufacture and distribution of petroleum and refined petroleum products in the United States.

B. The defendants and their co-conspirators have combined and conspired to conduct their petroleum operations on an integrated basis including the production, transportation, manufacture and distribution of petroleum and refined petroleum products with the purpose and effect of suppressing and eliminating competition from independent and non-integrated refiners and marketers of petroleum and refined petroleum products, including gasoline.

C. The defendants and their co-conspirators have combined and conspired to control and dominate the refining capacity in the United States with the purpose and effect of excluding and limiting the competition of independent refiners in the United States.

D. The defendants and their co-conspirators have combined and conspired to artificially limit the supply and distribution of refined petroleum products, including gasoline, in the United States.

E. The defendants and their co-conspirators have combined and conspired to enter into extensive product and exchange agreements on petroleum and refined petroleum products, including gasoline, among themselves so as to permit the defendants and their co-conspirators to dominate and control the manufacture and distribution of petroleum and refined petroleum products, including gasoline, in the United States and have combined and conspired to refuse to supply and to restrict the supply of petroleum and refined petroleum products, including gasoline, to independent refiners and independent marketers in the United States, including the plaintiff.

F. The defendants and their co-conspirators have combined and conspired to market and distribute refined petroleum products, including gasoline, only on a branded basis in the United States and to tie the sale and distribution of refined petroleum products, including gasoline, to the license of their respective trademarks with the purpose and effect of preventing their branded dealers and jobbers from obtaining and purchasing refined petroleum products, including gasoline, by specification from independent refiners and marketers and with the purpose and effect of restricting and eliminating the supply of refined petroleum products, including gasoline, available to independent marketers, including the plaintiff.

G. The defendants and their co-conspirators have combined and conspired to invest in gasoline stations on an uneconomic basis, to overconstruct gasoline stations and to maintain the operation of uneconomic

gasoline stations with the purpose and effect of dominating and controlling the supply and distribution of refined petroleum products, including gasoline, in the United States and with the purpose and effect of suppressing and eliminating the competition of independent refiners and marketers of refined petroleum products, including gasoline, in the United States.

H. The defendants and their co-conspirators have combined and conspired to tie the lease of gasoline stations in the United States to the sale and distribution of refined petroleum products, including gasoline, with the purpose and effect of dominating and controlling the supply and distribution of refined petroleum products, including gasoline, in the United States and with the purpose and effect of suppressing and eliminating the competition of independent refiners and marketers of refined petroleum products, including gasoline, in the United States.

I. The defendants and their co-conspirators have combined and conspired to lease gasoline stations to independent businessmen on short-term leases with the purpose and effect of controlling their purchasing and pricing decisions on the sale and distribution of refined petroleum products, including gasoline.

J. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in California, Oregon and Washington, have combined and conspired with their branded dealers and jobbers to fix the retail price of gasoline marketed at their branded stations in California, Oregon and Washington.

K. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline, have

combined and conspired to fix and control the price at which independent marketers purchased gasoline for resale in California, Oregon and Washington.

L. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in California, Oregon and Washington, have combined and conspired to refuse to supply and to restrict the supply of gasoline to independent marketers in California, Oregon and Washington.

M. The defendants and their co-conspirators have combined and conspired to fix and maintain artificially high stable prices for crude oil in the United States.

N. The defendants and their co-conspirators have combined and conspired to fix, raise and maintain the price of gasoline charged to independent marketers of gasoline, including the plaintiff.

O. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to fix the price at which gasoline was sold by the defendants' and their co-conspirators' branded dealers and jobbers.

P. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to engage in prolonged and intensified price wars.

Q. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the

competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to sell gasoline below cost through their branded channels of distribution.

R. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to grant and credit their branded dealers and jobbers with substantial amounts of depressed price allowances.

S. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to fix the retail price of gasoline at major branded gasoline stations.

T. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to severely limit and allocate the quantity of gasoline available for purchase by independent marketers at competitive prices in California, Oregon and Washington.

U. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, have combined and conspired to refuse to supply gasoline to independent marketers, including the plaintiff.

V. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has acquired independent refiners and independent marketers in California, Oregon and Washington and the effect of each such acquisition and of all such acquisitions on a combined basis may be substantially to lessen competition in the sale and distribution of gasoline.

W. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has consistently sold gasoline below cost in California, Oregon and Washington.

X. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has engaged in prolonged and destructive predatory price wars in the sale and distribution of gasoline in California, Oregon and Washington.

Y. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has granted and credited its branded dealers and jobbers with substantial amounts of depressed price allowances in the sale and distribution of gasoline in California, Oregon and Washington.

Z. Each of the defendants has combined and conspired with its branded dealers and jobbers to fix the resale price of gasoline marketed at such dealers and jobbers branded stations in California, Oregon and Washington.

AA. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has combined and conspired with its branded dealers and jobbers to fix the resale price of gasoline marketed at such dealers and jobbers branded stations in California, Oregon and Washington.

BB. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has refused to supply gasoline to independent marketers, including the plaintiff, in California, Oregon and Washington.

CC. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such competitors, has severely limited and allocated the quantity of gasoline available for purchase by independent marketers at competitive prices in California, Oregon and Washington.

DD. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline with the specific intent of controlling the prices of such competitors, has combined and conspired with its branded dealers and jobbers to refuse to supply gasoline to independent marketers of gasoline in California, Oregon and Washington.

EE. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent refiners and marketers of gasoline and with the specific intent of controlling the prices of such

competitors, has combined and conspired with its branded dealers and jobbers to severely limit and allocate the quantity of gasoline available for purchase by independent marketers at competitive prices in California, Oregon and Washington.

17. The defendants and their co-conspirators have done the things that they have combined, conspired and attempted to do and such illegal contracts, combinations, conspiracies and attempts to monopolize have substantially and directly injured and affected trade and commerce among the several states in the sale and distribution of gasoline.

18. The defendants and their co-conspirators have fradulently concealed the things which they have illegally contracted, combined, conspired and attempted to do.

19. By reason of the defendants' violations of Sections 1 and 2 of the Sherman Act, as set forth in this Complaint, the plaintiff has been injured in its business and property, including a loss of profits and loss of good will, in the amount of approximately $5,160,000, which amount is the best approximation the plaintiff can now make of its damages prior to the completion of discovery and which amount should be trebled in accordance with Section 4 of the Clayton Act, 15 U.S.C. § 15, and the plaintiff is therefore entitled to recover, jointly and severally, from each of the defendants the amount of $15,480,000.

20. Unless the defendants are restrained by this Court temporarily and permanently from continuing the violations of Sections 1 and 2 of the Sherman Act, as set forth in this Complaint, the plaintiff will be irreparably damaged and its very existence as an independent marketer of gasoline threatened.

21. Unless the defendants are temporarily and permanently compelled to supply the plaintiff with refined fuels, including gasoline, in at least the amounts that

defendants distributed to plaintiff in 1972, plaintiff will be severely and irreparably damaged.

WHEREFORE, the plaintiff demands judgment against the defendants for injury to its business and property as follows:

1. That the Court adjudge and decree that the contracts, combinations, conspiracies, attempts to monopolize and acts pursuant thereto, as alleged in this Complaint, be adjudged in violation of Sections 1 and 2 of the Sherman Act.

2. That the plaintiff Petrol Stops Northwest have judgment against and receive from the defendants, jointly and severally, for damages to its business and property by reason of the defendants' violations of Sections 1 and 2 of the Sherman Act, as alleged in this Complaint, the amount of $5,160,000, which amount should be trebled to $15,480,000, as required by law.

3. That the defendants Armour Oil Company, Continental Oil Company, its subsidiary, Douglas Oil Company and Gulf Oil Company be temporarily and perpetually enjoined and restrained from combining and conspiring to limit and restrict the quantity of gasoline sold and distributed to the plaintiff Petrol Stops Northwest and from refusing to sell gasoline to the plaintiff in violations of Sections 1 and 2 of the Sherman Act.

4. That the defendants Continental Oil Company and Gulf Oil Company be restrained and enjoined from refusing to sell gasoline directly to the plaintiff in the amounts that they provided gasoline to the defendant Armour Oil Company for distribution and resale to the plaintiff during 1972.

5. That the defendants be temporarily and perpetually enjoined and restrained from the commission of the violations of Sections 1 and 2 of the Sherman Act as

alleged in this Complaint. The plaintiff further prays that the Court adjudge and decree appropriate remedial equitable relief eliminating the defendants' domination and control of the manufacture and distribution of petroleum and refined petroleum products in the United States, including such divestiture as may be found necessary to open the manufacture and distribution of petroleum and refined petroleum products to free and unrestrained competition.

6. That the plaintiff have judgment against the defendants for the plaintiff's costs incurred in prosecuting this action and in addition thereto, a reasonable attorney's fee as required by law under Section 4 of the Clayton Act, 15 U.S.C. § 15.

7. The plaintiff prays for such other and further relief as the Court in the course of this action may deem just and proper.

DATED this 13th day of December, 1973.

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PLEASE TAKE NOTICE:
JURY TRIAL DEMANDED

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GAS-A-TRON OF ARIZONA and COINOCO, a Partnership,

Plaintiffs,

vs.

UNION OIL COMPANY OF CALIFORNIA;
AMOCO OIL COMPANY;
STANDARD OIL COMPANY OF INDIANA;
SHELL OIL COMPANY;
MOBIL OIL CORPORATION;
STANDARD OIL COMPANY OF CALIFORNIA;
PHILLIPS PETROLEUM COMPANY;
EXXON CORPORATION; and
DIAMOND SHAMROCK,

Defendants.

COMPLAINT

(Jury Trial Demanded)
Civil No. 73-191 TUC-WCF

The plaintiffs complain of the above-named defendants and demanding trial by jury allege as follows:

JURISDICTION

1. This Complaint is filed and the jurisdiction of this Court is invoked under the provisions of Sections 4 and 16 of the Act of Congress of October 15, 1914, C. 323, 38 Stat. 731, as amended (15 U.S.C. §§ 15, 26). The plaintiffs

seek to recover treble the amount of damages sustained by the plaintiffs by reason of the defendants' violations of Sections 1 and 2 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended (15 U.S.C. §§ 1, 2), commonly known as the Sherman Act and subparagraph (a) of Section 2 of the Act of Congress of October 15, 1914, C. 323, 38 Stat. 730, as amended (15 U.S.C. § 13(a)), commonly known as the Robinson-Patman Act, and to prevent and restrain such violations.

2. The defendants are presently qualified to do business in the State of Arizona and in fact have transacted business at all times alleged herein within the above-described district. The predatory conduct of the defendants alleged herein was undertaken and implemented in part within the above-described district.

3. The business of producing, transporting, manufacturing and marketing petroleum and refined petroleum products is within and directly and substantially affects trade and commerce among the several states.

DESCRIPTION OF THE PARTIES

4. The plaintiff, Gas-A-Tron of Arizona, is a partnership whose headquarters is located at 302 South Plummer, Tucson, Arizona, and is engaged in the retail distribution of gasoline in Tucson, Arizona, and in the Nogales and Oracle Junction areas, through independent self-serve gasoline stations. Gas-A-Tron distributes gasoline at retail through gasoline stations leased and operated by Gas-A-Tron, and through gasoline stations located on the premises of small grocery stores and other businesses which are operated as a joint venture between Gas-A-Tron and the owner-operators of these businesses. Prior to January 1, 1973, in the Tucson area, Gas-A-Tron distributed gasoline through 26 gasoline stations selling an annual volume of approximately 13 million gallons of gasoline in 1972. Since January 1, 1973, the plaintiff's

supply of gasoline has been drastically reduced pursuant to violations of the antitrust laws alleged in Count I.

5. The plaintiff, Coinoco, is a partnership whose headquarters is located at 302 South Plummer, Tucson, Arizona, and is engaged in the retail distribution of gasoline in Tucson, Arizona, through independent self-serve gasoline stations. Coinoco distributes gasoline at retail through gasoline stations leased and operated by Coinoco. Prior to January 1, 1973, in the Tucson area, Coinoco distributed gasoline through 2 gasoline stations selling an annual volume of approximately 700,000 gallons of gasoline in 1971. Since January 1, 1973, the plaintiff's supply of gasoline has been drastically reduced pursuant to violations of the antitrust laws alleged in Count I and Coinoco has been forced to cease its retail operations.

6. The defendant Union Oil Company of California is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Union in 1972 had gross sales of approximately 2.5 billion dollars, net earnings of 121.9 million dollars and assets in excess of 2.6 billion dollars. Union marketed gasoline under the "Union 76" brand name throughout the United States. Union has undertaken extensive and costly advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Union 76" brand. In Arizona Union has marketed gasoline through branded jobbers and dealers under the Union brand. It supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. The gasoline marketed by Union Oil Company moves in the flow of interstate commerce.

7. The defendant Amoco Oil Company is a wholly-owned subsidiary of defendant Standard Oil Company of

Indiana. Standard Oil Company of Indiana is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Standard Oil of Indiana in 1971 had gross sales of approximately $85 billion, net income in excess of $341 million, and assets in excess of $5.6 billion. Amoco Oil Company (formerly known under the firm name American Oil Company) is engaged in the manufacturing and marketing of petroleum and refined petroleum products, including gasoline, throughout the continental United States. Amoco markets gasoline in Arizona under the "Amoco" and "Standard" brands. Prior to January 1, 1973, Amoco also marketed under the "American" brand. In Arizona, Amoco markets gasoline through branded dealers and jobbers and on a company-operated basis. Amoco has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its brand names. Amoco supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. The gasoline marketed by Amoco in Arizona moves in the flow of interstate commerce.

8. The defendant Shell Oil Company is a major integrated oil company engaged in the production, transportation, manufacturing, and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. Shell in 1972 had gross income in excess of $4 billion, net income in excess of $260 million, and assets in excess of $1.5 billion. Shell markets gasoline under the "Shell" brand name throughout the continental United States. It has undertaken extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Shell" brand. Shell supplies its dealers and jobbers in Arizona with gasoline

manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Shell moves and has moved in the flow of interstate commerce.

9. The defendant Mobil Oil Corporation is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Mobil in 1971 had gross income in excess of $8.2 billion, net income in excess of $1.1 billion, and assets in excess of $8.4 billion. Mobil markets gasoline under the "Mobil" brand name in the western, midwestern and southeastern United States. Mobil has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its "Mobil" brand. Mobil supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Mobil in Arizona moves and has moved in the flow of interstate commerce.

10. The defendant Standard Oil Company of California is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Standard Oil Company in 1972 had gross sales of approximately $5.8 billion, net earnings of $6.4 million, and assets in excess of $2.3 billion. Standard markets gasoline under the "Chevron" and "Standard" brand names throughout the continental United States. Standard Oil Company of California has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its "Chevron" and "Standard" brands. Standard supplies its dealers and jobbers in Arizona with gasoline manu-

factured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Standard in Arizona moves and has moved in the flow of interstate commerce.

11. The defendant Phillips Petroleum Company is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, on a worldwide basis. In 1971, Phillips Petroleum had gross income in excess of $2.3 billion, net income in excess of $132 million, and assets in excess of $3.7 billion. Phillips Petroleum markets gasoline under the "Phillips" brand name throughout the continental United States. Phillips Petroleum has also undertaken to market gasoline on a self-serve basis under the "Blue Goose" brand. It has undertaken extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Phillips" and "Blue Goose" brands. Phillips supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Phillips in Arizona moves and has moved in the flow of interstate commerce.

12. The defendant Exxon Corporation, formerly Standard Oil of New Jersey, is the world's leading integrated petroleum enterprise and is engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products on a worldwide basis. Exxon in 1971 had gross sales in excess of $3.3 billion, net income in excess of $1.5 billion, and total assets in excess of $20.3 billion. Exxon markets gasoline under the "Exxon", "Humble" and "Esso" brands throughout the world. Exxon has undertaken

extensive advertising and sales promotion campaigns and has achieved a high level of brand recognition for its "Exxon" brand. It has entered into extensive agreements for the exchange of gasoline and gasoline products with other defendants and co-conspirators which permit it to expand its geographic scope of operation and attain a level of integration far beyond the capacity of its facilities and supply. The gasoline marketed by Exxon in Arizona moves and has moved in the flow of interstate commerce.

13. The defendant Diamond Shamrock is a major integrated oil company engaged in the production, transportation, manufacturing and marketing of petroleum and refined petroleum products, including gasoline, in the southwestern and Rocky Mountain areas of the United States. Shamrock in 1972 had net sales in excess of $600 million, net income in excess of $33 million, and current assets in excess of $234 million. Shamrock markets gasoline under the "Shamrock" brand name. Shamrock has undertaken an extensive advertising and sales promotion campaign and has achieved a high level of brand recognition for its "Shamrock" brand. Shamrock supplies its dealers and jobbers in Arizona with gasoline manufactured at refineries owned by it or its co-conspirators and transports such gasoline to its branded dealers and jobbers in Arizona by way of pipeline across state lines. Gasoline marketed by Shamrock in Arizona moves and has moved in the flow of interstate commerce.

CO-CONSPIRATORS

14. The major integrated oil companies, including Texaco, Atlantic Richfield Company, Conoco and Gulf, that have not been named at this time as defendants in this Complaint have shared a common business motivation with the named defendant major integrated oil companies to dominate and control the manufacture and

distribution of petroleum and refined petroleum products in the United States and have participated with the named defendants in the illegal contracts, combinations and conspiracies alleged in Count I of this Complaint and are designated in this Complaint as co-conspirators of the named defendants.

COUNT I

Sherman Act Offenses

15. Commencing at a period of time four years prior to the filing of this Complaint, the exact date being unknown to the plaintiffs, and continuing uninterruptedly up to and including the date of the filing of this Complaint, the defendants and their co-conspirators have contracted, combined and conspired in restraint of trade in the manufacture, sale and distribution of refined petroleum products, including gasoline, and have combined and conspired to monopolize trade and commerce in the manufacture, sale and distribution of refined petroleum products, including gasoline, and have attempted to monopolize trade and commerce in the manufacture, sale and distribution of refined petroleum products, including gasoline, in violation of Sections 1 and 2 of the Sherman Act. Such continuing contracts, combinations, conspiracies and attempts to monopolize have substantially and directly affected trade and commerce in the manufacture, sale and distribution of refined petroleum products, including gasoline, among the several states and have substantially and directly affected trade and commerce in the manufacture, sale and distribution of refined petroleum products, including gasoline, in the State of Arizona. Specifically, the defendants and their co-conspirators have done the following things:

A. Each of the defendants, with the specific intent of suppressing and eliminating the competition of

independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, has consistently sold gasoline below cost in Tucson.

B. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to consistently sell gasoline below cost in Tucson.

C. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, has engaged in prolonged and destructive predatory price wars in the sale and distribution of gasoline in Tucson, Arizona.

D. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to engage in prolonged and destructive predatory price wars in the sale and distribution of gasoline in Tucson, Arizona.

E. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent

marketers in such market, has granted and credited its branded dealers and jobbers with substantial amounts of depressed price allowances on the sale and distribution of gasoline.

F. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to grant and credit their branded dealers and jobbers with substantial amounts of depressed price allowances on the sale and distribution of gasoline.

G. Each of the defendants has combined and conspired with its branded dealers and jobbers to fix the retail price of gasoline marketed at their branded stations in Tucson, Arizona.

H. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, has combined and conspired with its branded dealers and jobbers to fix the retail price of gasoline marketed at their branded stations in Tucson, Arizona.

I. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired with their branded dealers and jobbers to fix the retail price of gasoline marketed at their branded stations in Tucson, Arizona.

J. Each of the defendants, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, has refused to supply gasoline to independent marketers in Tucson, Arizona.

K. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to refuse to supply gasoline to independent marketers in Tucson, Arizona.

L. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to fix and control the price at which independent marketers purchased gasoline for resale in Tucson, Arizona.

M. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to prevent independent marketers from marketing gasoline to the defendants' and their co-conspirators' branded dealers and jobbers.

N. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the

competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to severely limit and allocate the quantities of gasoline that independent marketers in Tucson could purchase for resale.

O. The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of such independent marketers in such market, have combined and conspired to rechannel the supply and distribution of refined fuels, including gasoline, into their branded channels of distribution so as to restrict and limit the supply of refined fuels, including gasoline, available to independent marketers in the Tucson market.

P. The defendants and their co-conspirators have combined and conspired to dominate and control the domestic refining capacity of the United States, acquire monopoly power in the domestic refining capacity of the United States and suppress and eliminate independent competition in the manufacture of refined petroleum products in the United States.

Q. The defendants and their co-conspirators have combined and conspired to monopolize the domestic manufacture and distribution of refined petroleum products, including gasoline

(1) by refusing to supply crude oil to independent refiners,

(2) by maintaining artificially high stable prices on the sale of crude oil to independent refiners,

(3) by controlling the importation of crude oil and refined petroleum products into the United States,

(4) by restricting and limiting the access of independent refiners and marketers to the transmission of refined petroleum products on product pinelines,

(5) by engaging in extensive exchange agreements and product arrangements between the defendants and their co-conspirators so as to permit each of the defendants to operate as a major integrated oil company and by refusing to enter into exchange agreements with independent refiners and marketers and by limiting the geographic scope and product quantity of exchange agreements with independent refiners and marketers,

(6) by foreclosing independent refiners and marketers from the opportunity to market gasoline and diesel fuel to major branded jobbers and dealers,

(7) by restricting the supply of gasoline through major branded channels of distribution,

(8) by refusing to supply and limiting the supply of gasoline and diesel fuel to independent marketers,

(9) by maintaining artificially high stable prices for gasoline and diesel fuel sold to independent marketers for resale,

(10) by eliminating the spot or rack price market in the sale and distribution of gasoline,

(11) by engaging in prolonged and destructive predatory price wars in the sale and distribution of gasoline and diesel fuel, and

(12) by artificially creating product shortages for petroleum and refined petroleum products in the domestic United States.

16. The defendants and their co-conspirators have done the things that they have combined, conspired and attempted to do and such illegal contracts, combinations, conspiracies and attempts to monopolize have substantially and directly injured and affected trade and commerce among the several states in the sale and distribution of gasoline.

17. The defendants and their co-conspirators have fraudulently concealed the illegal contracts, combinations, conspiracies and attempts to monopolize alleged in paragraph 15 of this Complaint.

18. By reason of the defendants' violations of Sections 1 and 2 of the Sherman Act, as set forth in Count I of this Complaint, each of the plaintiffs has been injured in its business and property, including a loss of profits and loss of good will, in the amount of approximately $1,350,000 for Gas-A-Tron and $55,000 for Coinoco, which amount is the best approximation the plaintiffs can now make of their damages prior to the completion of discovery and which amount should be trebled in accordance with Section 4 of the Clayton Act, 15 U.S.C. § 15, and the plaintiffs are therefore entitled to recover, jointly and severally, from each of the defendants under Count I of this Complaint the amount of $4,050,000 for Gas-A-Tron and $165,000 for Coinoco.

19. Unless the defendants are restrained by this Court temporarily and permanently from continuing the violations of Sections 1 and 2 of the Sherman Act, as set forth in Count I of this Complaint, the plaintiffs will be irreparably damaged and their very existence as marketers of gasoline through independent self-serve gasoline stations in Arizona threatened.

COUNT II

Robinson-Patman Act Offenses

20. The allegations set forth in paragraphs 1 through 14 are hereby incorporated in Count II of this Complaint.

21. Each of the defendants in the course and conduct of its business operations as a major integrated oil company, commencing at a time over four years prior to the filing of this Complaint and continuing uninterruptedly up to the date of the filing of this Complaint, has discriminated directly and indirectly in price on the sale of gasoline between its branded jobbers and dealers in the Tucson market and its jobbers and dealers in other markets in Arizona and in other states, including Texas and New Mexico, in violation of Section 2(a) of the Robinson-Patman Act. Each defendant discriminated directly and indirectly in price on the sale of gasoline between its branded jobbers and dealers in the Tucson market and its jobbers and dealers in other markets in Arizona and in other states, including Texas and New Mexico, by continually selling gasoline to its branded jobbers and dealers in the Tucson market at substantially lower prices than the price at which it sold gasoline of like grade and quality at approximately the same time to its jobbers and dealers in other areas of the State of Arizona and in other states, including Texas and New Mexico. The gasoline sold by the defendants to their jobbers and dealers in Arizona and to their jobbers and dealers in other states, including Texas and New Mexico, was shipped across state lines by truck and by pipeline and moved in the flow of interstate commerce. The defendants have subsidized the lower discriminatory prices charged their branded jobbers and dealers in the Tucson market from their business operation in other markets in other states and at other levels of the defendants' integrated petroleum operation so that the defendants have subsidized the lower discriminatory prices in

the Tucson market from the funds that defendants have generated in other markets and at other levels of their integrated petroleum operations in interstate and foreign commerce.

22. The effect of the discriminations in price by the defendants on the contemporaneous sale of gasoline to their jobbers and dealers in the Tucson market as set forth in the preceding paragraph, may be to substantially lessen competition or to tend to create a monopoly or to injure or destroy or prevent competition in the sale and distribution of gasoline in the Tucson market.

23. The substantially lower discriminatory prices charged by the defendants to their jobbers and dealers may be to substantially lessen competition or to tend to create a monopoly or to injure or destroy or prevent competition in the sale and distribution of gasoline in the Tucson market, in that:

A. The substantially lower discriminatory prices on the sale of gasoline by the defendants in the Tucson, Arizona, market were made by the defendants with the specific intent of suppressing and eliminating the competition of independent self-serve marketers of gasoline in Tucson, Arizona, at both wholesale and retail and with the specific intent of controlling the gasoline prices of independent self-serve marketers of gasoline at both wholesale and retail in such markets.

B. The substantially lower discriminatory prices on the sale of gasoline by the defendants in the Tucson, Arizona, market were made by the defendants with the specific intent of eliminating the established differential between the price of gasoline marketed at major branded gasoline stations and the price of gasoline marketed at independent self-serve gasoline stations.

C. The substantially lower discriminatory prices on the sale of gasoline by the defendants in the Tucson,

Arizona, market were consistently below the defendants' cost.

D. The substantially lower discriminatory prices on the sale of gasoline by the defendants in the Tucson, Arizona, market eroded and destroyed the competitive price structure in the sale and distribution of gasoline and led to sharply declining prices at the retail level in the sale and distribution of gasoline in the Tucson, Arizona, market.

E. The substantially lower discriminatory prices on the sale of gasoline by the defendants in the Tucson, Arizona, market were made by the defendants for the purpose of prolonging and intensifying destructive price wars in the sale and distribution of gasoline in such market and had the effect of prolonging and intensifying destructive price wars in the sale and distribution of gasoline in the Tucson, Arizona, market.

24. By reason of the defendants' violations of Section 2(a) of the Robinson-Patman Act, as set forth above in Count II of this Complaint, plaintiffs have been severely injured and damaged in their business and property, including the loss of profits and the loss of good will, in the amount of approximately $1,350,000 for Gas-A-Tron and $55,000 for Coinoco, which amounts are the best approximation that the plaintiffs can now make of their damages prior to the completion of discovery and which amounts should be trebled in accordance with Section 4 of the Clayton Act, 15 U.S.C. § 15, and the plaintiffs are, therefore, entitled to recover damages from each of the defendants under Count II of the Complaint in the amount of $4,050,000 for Gas-A-Tron and $165,000 for Coinoco.

25. Unless the defendants are temporarily and permanently restrained by this Court from continuing the violations of Section 2(a) of the Robinson-Patman Act, as set forth in Count II of this Complaint, plaintiffs will be

irreparably damaged and their very existence as marketers of gasoline through independent self-serve gasoline stations in Tucson, Arizona, threatened.

WHEREFORE, each of the plaintiffs demand judgment against the defendants for injury to its business and property as follows:

1. That the Court adjudge and decree that the contracts, combinations, conspiracies, attempts to monopolize and acts pursuant thereto, as alleged in Count I of this Complaint, be adjudged in violation of Sections 1 and 2 of the Sherman Act.

2. That the plaintiff Gas-A-Tron of Arizona have judgment against and receive from the defendants, jointly and severally, for damages to its business and property by reason of the defendants' violations of Sections 1 and 2 of the Sherman Act, as alleged in Count I the amount of $1,350,000, which amount should be trebled to $4,050,000, as required by law.

3. That the plaintiff Coinoco have judgment against and receive from the defendants, jointly and severally, for damages to its business and property by reason of the defendants' violations of Sections 1 and 2 of the Sherman Act, as alleged in Count I, the amount of $55,000, which amount should be trebled to $165,000, as required by law.

4. That the defendants be temporarily and perpetually enjoined and restrained from the commission of the violations of Sections 1 and 2 of the Sherman Act as alleged in Court I of this Complaint. The plaintiffs further pray under Count I of this Complaint that the Court adjudge and decree appropriate remedial equitable relief eliminating the defendants' domination and control of the manufacture and distribution of petroleum and refined petroleum products in the United States, including such divestiture as may be found necessary to open the manufacture

and distribution of petroleum and refined petroleum products to free and unrestrained competition.

5. That the Court adjudge and decree that the illegal discriminatory pricing alleged in Count II of this Complaint, be adjudged in violation of Section 2(a) of the Robinson-Patman Act.

6. That the plaintiff Gas-A-Tron have against and receive from the defendants, jointly and severally, for the damages to its business and property by reason of the defendants' violations of Section 2(a) of the Robinson-Patman Act, as alleged in Count II, the amount of $1,350,000, which amount should be trebled to $4,050,000, as required by law.

7. That the plaintiff Coinoco have against and receive from the defendants, jointly and severally, for the damages to its business and property by reason of the defendants' violations of Section 2(a) of the Robinson-Patman Act, as alleged in Count II, the amount of $55,000, which amount should be trebled to $165,000, as required by law.

8. That the defendants be temporarily and perpetually enjoined and restrained from the commission of the violations of Section 2(a) of the Robinson-Patman Act as alleged in Count II of this Complaint.

9. That the plaintiffs have judgment against the defendants for the plaintiffs' costs incurred in prosecuting this action and in addition thereto, a reasonable attorney's fee as required by law under Section 4 of the Clayton Act, 15 U.S.C. § 15.

10. The plaintiffs pray for such other and further relief as the Court in the course of this action may deem just and proper.

DATED this 2nd day of November, 1973.

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PLEASE TAKE NOTICE:
JURY TRIAL DEMANDED